Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

TOWN OF NORWOOD AND THE
NORWOOD MUNICIPAL LIGHT DEPARTMENT,
Petitioners,

v.

NEW ENGLAND POWER COMPANY,
Respondent.

Petition for a Writ of Certiorari to the Commonwealth of Massachusetts Appeals Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether rate components that the Federal Energy Regulatory Commission has specifically declared that it never accepted for filing can constitute a "filed rate" under the Federal Power Act, 16 U.S.C. § 824d(c), and serve as the basis for a state court award of contract damages under *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571 (1981).

STATEMENT REQUIRED BY RULES 14.1 AND 29.6

Pursuant to Supreme Court Rule 14.1, petitioner states that all parties to the proceeding in the court whose judgment is sought to be reviewed are included in the caption.

Pursuant to Supreme Court Rule 29.6, petitioner states that New England Power Company is a public utility subject to the jurisdiction of the Federal Energy Regulatory Commission under the Federal Power Act and is wholly owned by National Grid, USA, a British-owned company.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Town of Norwood and the Norwood Municipal Light Department respectfully petition for a writ of certiorari to review the judgment of the Commonwealth of Massachusetts Court of Appeals in this case.

OPINIONS BELOW

The opinions of the Massachusetts superior court are unpublished, and are reproduced in the Petition Appendix (Pet. App.) at 7a-8a and at 9a-33a. The opinion of the Massachusetts Court of Appeals is unpublished, and is reproduced at Pet. App. 1a-6a. The order of the Massachusetts Supreme Judicial Court denying further appellate review is unpublished, and is reproduced at Pet. App. 34a.

JURISDICTION

The judgment of the Court of Appeals was entered on October 10, 2003. An application for further appellate review was denied by the Massachusetts Supreme Judicial Court on November 25, 2003. This Court extended the time for filing this petition for certiorari to and including March 24, 2004. This Court has jurisdiction in this case under 28 U.S.C. § 1257.

RELEVANT STATUTORY PROVISIONS

The petition involves the following provisions of the Federal Power Act ("FPA"): 16 U.S.C. §§ 824d, 824e. The pertinent text of these provisions is set forth in the Pet. App. at 35a-42a.

STATEMENT OF THE CASE

In this case, the Federal Energy Regulatory Commission ("FERC") approved an amendment to the tariff of respondent New England Power Company ("NEPCO") that allowed its customers the option to terminate their contract by giving the Company 30 days' written notice and paying a contract termination charge ("CTC"). *New England Power Co.*, 83 FERC ¶ 61,174 (1998). In so doing, FERC accepted for filing NEPCO's generic rate formula for calculating those charges. The actual rate that would be charged any given customer who selected this option would depend on the customer-specific rate components plugged into the formula. While it accepted the generic formula for filing, FERC never accepted for filing the specific rate components that would determine the actual monetary rate that NEPCO would charge petitioners Town of Norwood and the Norwood Municipal Light Department (collectively "Norwood") under that formula. FERC confirmed in an order issued July 2, 2003, that it has not approved these rate components, and set a hearing for the determination of the "just and reasonable" CTC components applicable to Norwood. *Town of Norwood, Mass.* v. *National Grid USA*, 104 FERC ¶ 61,030, at 61,074 (¶ 18) (2003), Pet. App. 51a-52a. The Commission Staff has presented testimony that such a CTC should not exceed $9 million, in contrast to the $78 million claimed by NEPCO for the entire contract period of April 1, 1998, through October 31, 2008. Ex. S-1, Whitfield Dep. Test. at 22, *Town of Norwood, Mass.* v. *National Grid USA*, 104 FERC ¶ 61,030 (taken Feb. 10, 2004), Pet. App. 70a.

Nonetheless, the Massachusetts state court below affirmed a judgment that treated NEPCO's claimed (but unfiled and unapproved) Norwood-specific rate components as the "filed rate," which Norwood was ordered to pay. The court below thus allowed contract damages of over $27 million, including 18% interest, to be awarded against Norwood on the basis of a claimed monthly CTC rate of $615,674 for only the first

part of the contract period (through January 31, 2001). *Id.* at 4a-5a & n.5. However, neither the actual monthly rate of $615,674 nor NEPCO's inflated and untested claimed rate components that yield that rate under the CTC formula have ever been accepted for filing or approved by the FERC. *Id.* at 51a-52a. The Massachusetts court so ruled even though Norwood had notified it of FERC's own determination (during the pendency of the appeal) that FERC had never accepted or approved the components. *Id.* at 58a-68a. The court erroneously brushed aside FERC's ruling as having no effect on this case. *Id.* at 5a n.6. By disregarding the governing federal agency's conclusive determination of whether rate components have been filed, and awarding damages based on this unaccepted and unapproved rate, the ruling below violates the filed rate doctrine and directly contravenes this Court's decision in *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571 (1981) ("*Arkla*"). See also *New England Power Co.* v. *New Hampshire*, 455 U.S. 331, 340 (1982); *FPC* v. *Southern Cal. Edison Co.*, 376 U.S. 205, 215-16 (1964); *Montana-Dakota Utils. Co.* v. *Northwestern Pub. Serv. Co.*, 341 U.S. 246, 251 (1951); *Louisville & Nashville R.R.* v. *Maxwell*, 237 U.S. 94, 97 (1915). Given the importance of the filed rate doctrine in federal public utility law, this Court should grant certiorari and reverse the judgment by the Massachusetts court which preempted FERC's well-established, exclusive federal jurisdiction.

A. The Federal Power Act

The FPA authorizes FERC to regulate, *inter alia*, the rates and charges connected with the transmission and sale of electricity by utilities. See generally 16 U.S.C. §§ 792, 797. The FPA mandates that all such rates and charges be "just and reasonable," FPA § 205(a), 16 U.S.C. § 824d(a), and that no public utility grant an "undue preference or advantage" or "maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect." FPA § 205(b), 16 U.S.C. § 824d(b). Furthermore, the Act requires that public

utilities file with FERC "schedules showing all rates and charges for any transmission or sale [of electricity]," along with "the classifications, practices, . . . regulations" and contracts that affect or are related to these rates and charges. FPA § 205(c), 16 U.S.C. § 824d(c); see also 18 C.F.R. § 35.1(e) ("No public utility shall, directly or indirectly, demand, charge, collect or receive any rate, charge, or compensation [etc.] . . . which is different from that provided in a rate schedule required to be on file with" FERC.).

Section 205 of the FPA also covers rate changes proposed by public utilities. To effect such changes, the utilities must file new schedules with FERC and provide 60 days' notice to FERC and to the public. FPA § 205(d), 16 U.S.C. § 824d(d). Once such schedules are filed, FERC may (upon complaint or on its own initiative) commence hearings regarding these proposed rates and charges. FPA § 205(e), 16 U.S.C. § 824d(e). FERC may suspend the operation of proposed changes for up to five months after the proposed effective date. *Id.* If the hearing has not concluded after five months have passed, the changes become effective. However, upon a determination that the rates or charges are unjust or unreasonable, FERC may order refunds with interest upon the hearing's conclusion. *Id.*

Section 206 of the FPA authorizes the FERC, on its own motion or on a third party's complaint, to hold a hearing to determine whether a rate or charge is "unjust, unreasonable, unduly discriminatory or preferential." FPA § 206(a), 16 U.S.C. § 824e(a). Upon such a finding, FERC must determine the just and reasonable rate "and shall fix the same by order." *Id.* When it initiates a proceeding, FERC must establish a "refund effective date." Should FERC determine that a utility was charging an unjust or unreasonable rate, the Commission will order the utility to refund the difference between the rate it charged and the new just and reasonable rate for a 15-month period, subject to certain exceptions and considerations. This period begins on the refund effective

date. FPA § 206(b), 16 U.S.C. § 824e(b); see also FPA § 206(c), 16 U.S.C. § 824e(c).

Under the FPA, as under other regulatory statutes, a regulated entity may charge—and courts may enforce—only the rate that is filed with the governing regulatory agency (here, FERC). *Arkla*, 453 U.S. at 576-78; see also 16 U.S.C. § 824d(c). This principle is known as the "filed rate" doctrine: a utility "can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission, and not even a court can authorize commerce in the commodity on other terms." *Montana-Dakota*, 341 U.S. at 251. As a corollary, this doctrine "prohibits a party from recovering damages measured by comparing the filed rate and the rate that might have been approved absent the conduct in issue." *H.J. Inc.* v. *Northwestern Bell Tel. Co.*, 954 F.2d 485, 488 (8th Cir. 1992) (citing *Arkla*, 453 U.S. at 578-79).

This petition raises the important question of what constitutes a "filed rate" under the FPA. In particular, this petition addresses whether a naked formula without accepted or approved components satisfies the filed rate doctrine.

B. Factual Background

The Town of Norwood does not own any power generation plants, but it does own and operate a municipal utility that distributes power acquired at wholesale to its retail customers, who are principally residents and businesses in the town. Beginning in the 1970s, Norwood sought to purchase wholesale power from NEPCO under NEPCO's FERC Tariff No. 1, under which it sold wholesale power to its affiliates. NEPCO refused to deal with Norwood, which led Norwood to file an antitrust suit against NEPCO. In the midst of trial, NEPCO changed its position and agreed to a settlement agreement and power contract that was approved by the district court on April 11, 1983. The contract required NEPCO to supply Norwood's power requirements from

November 1, 1983, according to the terms of its FERC Tariff No. 1, as it may be amended from time to time, but also provided that "[i]n the event of any conflict between the provisions of this Contract and the provisions of NEPCO's FERC Tariff, the provisions of this Contract shall control." Under the contract, Norwood would purchase its requirements for electricity from NEPCO through October 31, 1998. In addition, the contract could be terminated by written notice, but the termination date could not be earlier than seven years from the notification date. Norwood and NEPCO amended their power contract in 1989 and provided Norwood with the option to extend the contract in two ten-year increments, with one year of notice prior to a date of extension. On July 25, 1990, Norwood notified NEPCO that it was accepting this option and extended the power contract until October 31, 2008.

In February 1998, NEPCO obtained regulatory approval to divest itself of certain generating assets and to terminate the power purchase contracts under Tariff No. 1 with its distribution affiliates, comprising over 97% of its power sales. *New England Power Co.*, 82 FERC ¶ 61,179, at 61,655 (1998). NEPCO's restructuring undermined Norwood's contract rights and was severely prejudicial, and Norwood asserted that NEPCO was in material breach of the power contract. Norwood, therefore, ceased performance, repudiated its contract obligations, and switched to a different wholesale supplier on March 4, 1998.

In response, NEPCO unilaterally "filed an amendment to its FERC Electric Tariff, Original Volume No. 1 (Tariff No. 1), to permit its Tariff No. 1 customers the option of terminating service early, subject to the payment of a contract termination charge (CTC)." *New England Power Co.*, 83 FERC ¶ 61,174, at 61,721. As Exhibit A to its filed revised tariff sheets, NEPCO submitted (1) a revised Term of Service provision of the tariff to provide that a customer "may exercise an option to terminate service under this tariff early by giving the

Company 30 days' written notice," and, among other things, paying the CTC applicable under Schedule II-C of this tariff, and (2) a complicated formula embodied in Schedule II-C for calculating a monthly CTC based on customer revenue, the estimated market value of the released capacity and associated energy, and the length of the customer's obligations. The FERC upheld the "amendment provid[ing] NEPCO's Tariff No. 1 customers with the option of buying out their service agreements by the payment of a CTC" because it "would be supplemental to, and generally consistent with, the existing opportunity available to Tariff No. 1 customers to seek to modify and/or terminate their contracts." *Id.* at 61,723. The FERC accepted the sheets in Exhibit A containing the "Revised Term of Service" and the "Formula for the Calculation of Contract Termination Charges" as revisions to the tariff. *Id.* at 61,723-24.

NEPCO had also proposed as Exhibit E to its tariff amendment a specific monthly contract termination rate for Norwood of $615,674 based on its (self-serving) calculation of the formula components. NEPCO claimed that this monthly rate would total $78 million over the life of the contract. Significantly, FERC never accepted Exhibit E for filing as a revision of the tariff; FERC's approval extended only to the generic formula set forth in Exhibit A. *Id.*

The FERC orders authorizing divestiture and the tariff amendment offering to customers the option of paying contract termination charges were upheld on appeal. *Town of Norwood, Mass.* v. *FERC*, 202 F.3d 392 (1st Cir. 2000); *Town of Norwood, Mass.* v. *FERC*, 217 F.3d 24 (1st Cir. 2000). In separate federal court litigation, NEPCO successfully invoked the filed rate doctrine, among other grounds, to defend against Norwood's claims of anti-trust and breach of contract. *Town of Norwood, Mass.* v. *New England Power Co.*, 202 F.3d 408 (1st Cir. 2000).

During the pendency of the federal appeals, NEPCO filed this state court action in Massachusetts superior court

claiming that Norwood breached its contract by not paying monthly contract termination charges of $615,674 per month, even though the specific rate components it sought to charge Norwood had not been accepted or approved by the Commission as part of the amended tariff. According to NEPCO's calculations, Norwood's eventual liability under the CTC would exceed $78 million. Norwood moved the court to dismiss the action for lack of state court jurisdiction, but that motion was denied. Norwood answered and counterclaimed against NEPCO.

The superior court granted NEPCO summary judgment on the issue of liability, holding that there was no material dispute that Norwood breached the contract by failing to pay a CTC charge. Pet. App. 30a-32a. The court found that "[t]he facts show that a contract existed between Norwood and NEP[CO], which required Norwood to pay a CTC in the event of an early termination." *Id.* at 31a. Furthermore, "Norwood extended that contract, then terminated before the date allowed by the contract and has not paid the CTC or any other charge as a result." *Id.* The court therefore concluded that Norwood breached the power contract. In reaching its holding, the court rejected Norwood's argument that the CTC is an option that it did not accept when it terminated the contract and that Norwood should be subject, at most, to contract damages under Massachusetts law. *Id.* at 28a. The court also rejected without any trial Norwood's claim that NEPCO's contract claim was barred because NEPCO's conduct in divesting its generation facilities resulted in a frustration of purpose justifying Norwood's action. On the issue of damages, the superior court treated the CTC as a filed rate, including NEPCO's claims regarding the component values specific to Norwood that should be plugged into the formula, even though the FERC had never accepted the rate components for filing. The superior court thus accepted NEPCO's claim that the monthly CTC rate applicable to Norwood was $615,674. *Id.* at 7a-8a. The superior court

entered a judgment in the sum of $27,149,054.08, which includes interest of 18% from May 1, 1998, through January 31, 2001.

C. The Decision of the Massachusetts Court of Appeals

The Massachusetts appeals court affirmed the superior court, holding that Norwood breached the power contract and is liable for more than $27 million in damages under the terms of the CTC. Pet. App. 1a. The appeals court quoted the superior court approvingly in reaching its holding. *Id.* at 4a. The court found that "it is undisputed that Norwood entered into a valid contract with NEP[CO] that subsequently included a CTC." *Id.* The court concluded, as did the superior court, that the CTC was not an option and that Norwood was contractually bound to pay the CTC, and it affirmed the holding that Norwood's counterclaims are barred by *res judicata*. *Id.* at 4a-6a. The appeals court also affirmed the award of damages, explaining (among other things) that the CTC rate was essentially liquidated damages and that their determination is a mere "'computational exercise.'" *Id.* at 5a. The appeals court approved the superior court's use of the monthly CTC rate of $615,674, even though neither that numerical rate nor the Norwood-specific rate component values that NEPCO plugged into the generic CTC formula were ever accepted for filing by the FERC.

During the pendency of the appeal, after oral argument, FERC specifically confirmed that it had not accepted the rate components when it accepted the generic CTC formula. *Town of Norwood*, 104 FERC at 61,074 (¶ 18), Pet. App. 51a-52a. Norwood filed a letter alerting the appeals court to the FERC order as proof that there was no "filed rate" of $615,674 that could serve as the basis for an award of contract damages. *Id.* at 66a-68a; see also *id.* at 58a-65a. The Court of Appeals brushed aside the FERC order, refusing to address the filed rate argument, and finding that the "FERC order has no effect on this case" because it construed the

relief that FERC would order as applying only to charges subsequent to a time period covered by the judgment. *Id.* at 5a n.6. The Supreme Judicial Court of Massachusetts denied discretionary review. *Id.* at 34a.

REASONS FOR GRANTING THE PETITION

This case presents a stark case of federal-state conflict and a state court judgment that is in direct contravention of this Court's decision in *Arkla*, 453 U.S. 571 (1981). This Court's review is imperative to restore uniformity in federal law and to bring order to the filed rate doctrine, which is a central element of utility rate regulation under multiple federal Acts. See, *e.g.*, Natural Gas Act, 15 U.S.C. §§ 717-717z; Communications Act, 47 U.S.C. §§ 151-1110.

Under the Federal Power Act, exclusive jurisdiction to regulate the rates charged by sellers of electricity like NEPCO lies with FERC. 16 U.S.C. § 824(b); *New England Power Co.*, 455 U.S. at 340. By granting sole ratemaking authority to FERC, "Congress meant to draw a bright line easily ascertained, between state and federal jurisdiction." *Southern Cal. Edison Co.*, 376 U.S. at 215-16 ("This was done in the Power Act by making [FERC] jurisdiction plenary and extending it to all wholesale sales in interstate commerce except those which Congress has made explicitly subject to regulation by the States."). Consistent with its authority, FERC promulgated regulations that specifically prohibit a utility from enforcing a rate other than a rate on file with FERC:

> No public utility shall, directly or indirectly, demand, charge, collect or receive any rate, charge or compensation for or in connection with electric service subject to the jurisdiction of the Commission, . . . which is different from that provided in a rate schedule required to be on file with this Commission unless otherwise

> specifically provided by order of the Commission for good cause shown.

18 C.F.R. § 35.1(e). It is against this backdrop and in the shadow of the Supremacy Clause that courts construing the Federal Power Act and similar statutes have consistently applied the so-called filed rate doctrine to strike down enforcement of rates that have not been accepted by FERC.

The fundamental rule of the filed rate doctrine is that a regulated entity may not charge rates for its services other than those properly filed with the appropriate regulatory authority. See, *e.g.*, *AT&T Co.* v. *Central Office Tel., Inc.*, 524 U.S. 214, 221 (1998) (filed rate doctrine applicable to Communications Act); *Arkla*, 453 U.S. at 578 (under the filed rate doctrine "[n]ot only do the courts lack authority to impose a different rate than the one approved by the Commission, but the Commission itself has no power to alter a rate retroactively"). "The filed rate doctrine has its origins in [the Supreme Court's] cases interpreting the Interstate Commerce Act, and has been extended across the spectrum of regulated utilities." *Id.* at 577 (internal citations omitted); see also *Louisville*, 237 U.S. at 97 ("Under the [I]nterstate [C]ommerce [A]ct, the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext."). "'The considerations underlying the doctrine . . . are preservation of the agency's primary jurisdiction over reasonableness of rates and the need to insure that regulated companies charge only those rates of which the agency has been made cognizant.'" *Arkla*, 453 U.S. at 577-78 (quoting *City of Cleveland* v. *FPC*, 525 F.2d 845, 854 (1976)).

Here, the Massachusetts courts awarded CTC damages against Norwood at a rate of $615,674 per month to NEPCO over a 33 month period, even though neither that rate (nor any of NEPCO's proposed Norwood-specific rate components that yield that rate when plugged into the CTC formula) had been accepted for filing or approved by FERC. Indeed, *prior* to the decision below, FERC had expressly stated that "[t]he

Commission has approved the use of a CTC for the early termination of a contract and has accepted NEPCO's CTC formula, *but has not accepted the individual components for the CTC calculation. . . .* [and] *has not approved the individual components used in NEPCO's calculation of Norwood's CTC*." It ordered a hearing "into the justness and reasonableness of the calculation of the CTC." *Town of Norwood*, 104 FERC at 61,074 (¶ 18), Pet. App. 51a-52a (emphasis added, footnote omitted).

The critical point is that no CTC rate is a filed rate until the rate components are accepted for filing and approved by the FERC. Section 205 of the Federal Power Act requires a public utility to file with FERC "schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services." 16 U.S.C. § 824d(c). The generic CTC formula is not itself a rate; the components that define the rate, the Commission has determined, involve complex issues of fact and law under the Federal Power Act, requiring a hearing. In the hearing process now underway at the FERC, the Commission's Staff has testified that the Commission "has not approved this particular CTC, nor has it accepted or approved any of the assumptions underlying the stranded cost calculation as the basis for any of the elements of the CTC formula[]" (with the exception of an uncontested issue). Ex. S-1, Whitfield Dep. Test. at 12, *Town of Norwood, Mass.* v. *National Grid USA*, 104 FERC ¶ 61,030 (taken Feb. 10, 2004), Pet. App. 70a. The Staff further testified that, based on the actual cost of NEPCO's fixed facilities, the CTC would not exceed $9 million for the entire contract period of April 1, 1998, through October 31, 2008. *Id.* at 22, Pet. App. 70a. This figure stands in contrast to the $78 million that NEPCO erroneously

represented to the state court was the "filed rate" accepted and approved by FERC.

The state court cannot simply disregard FERC's conclusive determination that the CTC rate components (which are the only actual rate) were not accepted for filing,[1] without undermining the primacy of the federal agency under the FPA in regulating rates.[2] See *Entergy La., Inc.* v. *Louisiana Pub.*

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[1] The state court believed that this FERC order, which determined that the CTC components had not been filed, had no effect because the refund effective date was later than the period of judgment. This ruling conflicts with *Arkla* where this Court held that a state court cannot award damages *at any time* based on a rate that FERC has not approved or accepted.

[2] The evident reason that FERC did not accept NEPCO's rate components for filing in 1998 is that it had approved the CTC rate formula as an *option* that NEPCO's customers (such as Norwood) could accept, and the actual rate components applicable to a specific customer were only determinable upon the date that the customer elects the CTC option. *See* 83 FERC ¶ 61,174, at 61,723 (accepting "amendment provid[ing] NEPCO's Tariff No. 1 customers with the option of buying out their service agreements by the payment of a CTC" because it "would be *supplemental to*, and generally consistent with, the existing opportunity available to Tariff No. 1 customers to seek to modify and/or terminate their contracts") (emphasis added). There was no reason for FERC to accept a customer-specific rate filing prior to the customer's giving the required written notice that it would accept the CTC option.

The state court failed to grasp this point because it erroneously interpreted the tariff amendment as affording Norwood (and other NEPCO customers) only the option of either continuing performance or paying the CTC rate. Pet. App. 4a-5a. That interpretation is wrong because (if true) the tariff amendment would have abrogated Norwood's contract right to cease performance upon a material breach by NEPCO. NEPCO's filing of the CTC could not extinguish Norwood's right to cease performance upon material breach without paying damages because that would violate this Court's well-established prohibition on modification of contracts by unilateral tariff amendments. *See FPC* v. *Sierra Pac. Power Co.*, 350 U.S. 348 (1956); *United Gas Pipe Line Co.* v. *Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956). Indeed, in reviewing the FERC's order, the First Circuit found no violation of the *Mobile-Sierra* doctrine precisely because the CTC was a true option (*i.e.*, one that the customer could elect *in lieu of*

Serv. Comm'n, 123 S. Ct. 2050, 2056 (2003) (holding under the filed rate doctrine that FERC cost allocations cannot be second-guessed by state authorities). A rate must be either "fixed or . . . accepted by the Commission" in order to be a "filed rate." *Montana-Dakota*, 341 U.S. at 251. Customer-specific CTC rates never accepted by FERC are not "filed" within the meaning of the filed rate doctrine.

Because FERC never accepted and approved any CTC rate components for Norwood, the mere formula that FERC accepted for filing in 1998 cannot serve as the basis of contract damages. The only applicable rates that were filed in NEPCO's tariff were the rates for the actual purchase of the power, and only those rates could be used as inputs in calculating contract damages. The contrary holding of the Massachusetts Court of Appeals places it in direct conflict with *Arkla*, 453 U.S. 571 (1981).

In *Arkla*, this Court held that a state court is prohibited under the filed rate doctrine from awarding breach of contract damages that were calculated as the difference between the natural gas rate[3] currently filed with the FERC and the rate that would have been charged had the parties properly adhered to the underlying contract. The respondent natural gas producers in that case had entered into a contract with the Arkansas Louisiana Gas Company ("Arkla") where respondents agreed to sell Arkla natural gas from a particular field in Louisiana. *Id.* at 573. Under a "favored nations clause" in the contract, Arkla agreed to pay a higher price to respondents in the event that it bought natural gas in this field

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breaching the contract). *Town of Norwood*, 202 F.3d at 400. Since no CTC rate was filed, much less elected by Norwood in accord with the tariff, NEPCO's only remedy for any nonperformance by Norwood was to prove actual contract damages.

[3] While *Arkla* involved natural gas regulation under the Natural Gas Act, 15 U.S.C. §§ 717-717z, this Act and the FPA are "in all material respects substantially identical," and therefore are cited interchangeably. *Arkla*, 453 U.S. at 577 n.7 (internal quotation marks omitted).

from a third party at a rate higher than the one it was paying respondents. Respondents filed this contract and its rate arrangement with FERC. Seven years later, respondents filed suit in Louisiana state court, claiming that Arkla violated the contract by producing gas on applicable leaseholds purchased from the United States and paying the United States more than Arkla was paying respondents. Respondents sought damages in the amount of the difference between their received payments and those which Arkla was paying the United States. *Id.* at 574.

The Louisiana state trial court held that the filed rate doctrine barred the award of damages despite its conclusion that Arkla's payments to the United States had triggered the "favored nations clause." The appellate state court affirmed, but the Louisiana Supreme Court reversed. The Louisiana state court determined that, because Arkla failed to inform them about its new leasehold, respondents were unable, as a practical matter, to file the increased rate due to them. Nonetheless, the state court concluded that FERC would have approved this increased rate had respondents known about the new leasehold and submitted the new rate for approval. The state court therefore ordered an award of damages measured as the difference between what the court decided respondents would have received and what they did receive. *Id.* at 575.

This Court reversed, holding that, under the filed rate doctrine, a state court may not award contract damages based on a rate that was not accepted for filing or approved by FERC but that might have been approved had it been submitted. *Id.* at 578-79, 584. This Court explained that a state court would undermine the purpose of the Natural Gas Act and FERC's exclusive jurisdiction over rate regulation by awarding damages based on a rate never accepted for filing or approved by FERC and thus never approved as "just and reasonable." *Id.* at 579-80. Under *Arkla*, therefore, a state court's award of damages for breach of a contract whose

subject matter is regulated by FERC must be predicated on rates accepted for filing and approved by FERC.

Because the CTC rate components had never been accepted for filing by FERC,[4] they cannot serve as the basis for calculating damages. The decision below, by departing from the clear command of *Arkla*, presents a clear issue warranting this Court's review.

The filed rate doctrine is the cornerstone of federal utility rate regulation. Public utilities cannot subvert that doctrine by filing generic rate structures, but never filing the actual components that comprise the rate. Such strategic manipulations deprive FERC and the public of the opportunity guaranteed in section 205 of the FPA to evaluate rate changes *before* they go into effect in order to determine if they are just, reasonable, and nondiscriminatory. See 16 U.S.C. § 824d(c) & (d). NEPCO's position—that it need not file the CTC components that yield the actual rate, but that it should be awarded damages based on its unilateral claims of the value of those components that cannot be adjudicated in state court, *Montana-Dakota*, 341 U.S. at 250-52—is clearly irreconcilable with the FPA and this Court's precedent. This case illustrates the injustice of this principle. NEPCO has asserted that CTC charges over the entire termination period will total $78 million (and was awarded $27 million of that total through January 31, 2001, in the judgment below). FERC staff, however, have submitted testimony in the pending agency proceedings that the total CTC rate for the entire period should be approximately $9 million. Ex. S-1, Whitfield Dep. Test. at 22, *Town of Norwood, Mass.* v. *National Grid USA*, 104 FERC ¶ 61,030 (taken Feb. 10,

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[4] If NEPCO believed FERC erred in 1998 in refusing to accept for filing its proposed Norwood-specific components as the rate it would charge Norwood, it was incumbent upon NEPCO to seek review of that order, or to refile those components if Norwood ever elected the CTC option in writing (which it never did). NEPCO cannot fault FERC for its own inaction.

2004). Pet. App. 70a. State courts must defer to the federal agency's determinations of when a rate is accepted for filing, and cannot award damages under the filed rate doctrine if the rate for which damages were awarded was never accepted for filing or approved by the Commission.

Furthermore, requiring the Town of Norwood to pay a $78 million damages award will have a dramatically detrimental effect on the Town. For such a small municipality (with a population of 28,000), the imposition of this substantial liability is unwarranted and disproportionate to the Town's size, particularly since Norwood uses only 1.32% of NEPCO's total load.

CONCLUSION

The petition for a writ of certiorari should be granted, and the judgment below summarily reversed, or the case set for argument.

Respectfully submitted,

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APPENDICES

APPENDIX A

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

No. 01-P-1467

NEW ENGLAND POWER COMPANY,

vs.

TOWN OF NORWOOD & another.[1]

Oct. 10, 2003.

MEMORANDUM AND ORDER
PURSUANT TO RULE 1:28

This is a breach of contract action filed by the plaintiff, New England Power Company (NEP), to recover damages from the town of Norwood (Norwood) resulting from Norwood's premature termination of a contract for electricity. Norwood answered NEP's complaint, asserting a broad array of affirmative defenses and counterclaims. In a series of rulings, a Superior Court judge allowed NEP's motion for summary judgment on its complaint, dismissed Norwood's counterclaims, denied Norwood's emergency motion for trial on damages, and awarded NEP damages in the amount of $27,149,054.08. From the resulting judgment Norwood appeals. We affirm.

Background. We briefly examine the background in this case, noting that other courts have extensively done so before us. *Norwood* v. *Federal Energy Regulatory Commn.*, 202 F.3d 392 (1st Cir.), cert. denied, 531 U.S. 818 (2000)

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[1] Norwood Municipal Light Department.

(*Norwood* I). *Norwood* v. *New England Power Co.*, 23 F. Supp. 2d 109 (D. Mass. 1998), *S.C.*, 202 F.3d 408 (1st Cir. 2000) (*Norwood* II). *Norwood* v. *Federal Energy Regulatory Commn.*, 217 F.3d 24 (1st Cir. 2000), cert. denied, 532 U.S. 993 (2001) (*Norwood* III).

Norwood entered into a contract for electricity with NEP for the period November 1, 1983, to October 31, 1998. The basic terms of the contract stated that NEP would supply Norwood with the bulk of the town's electric power starting on November 1, 1983, and then 100 percent of its power needs beginning on November 1, 1985. The provision of electricity was in exchange for payment according to rates set by the Federal Energy Regulatory Commission (FERC). (App. 799-800).

The parties subsequently modified their agreement in 1989 and allowed for an option to extend the term of the contract. On July 25, 1990, Norwood sent a letter to NEP and exercised the option to extend the contract through October 31, 2008.

In December, 1996, NEP began the process of restructuring itself and attempting to revise the existing tariffs for wholesale power sales. To that end, it filed a series of proposals with the FERC. In orders issued between November, 1997, and June, 1998, the FERC approved NEP's restructuring and tariff proposals over the objection of Norwood.

While NEP's proposals were still under consideration by the FERC, Norwood brought an action in Federal district court in April, 1997. As subsequently amended, Norwood's complaint alleged a breach of the 1983 power contract and also antitrust violations by NEP. See *Norwood* II, 202 F.3d at 412. The district court dismissed the claims, including the one for breach of contract, on the ground that the filed rate

doctrine precluded Norwood's causes of action.[2] On appeal, the Court of Appeals for the First Circuit affirmed the dismissal of all but one count, which is not relevant here.[3]

Meanwhile, during the pendency of its Federal action, Norwood sent a letter to NEP on March 4, 1998, notifying the company that it was terminating the contract effective April 4, 1998. In the interim, on March 18, 1998, NEP sought approval from the FERC to require the payment of a contract termination charge (CTC) in the event a requirements contract customer, such as Norwood, wished to terminate its power contract early.[4] Over Norwood's objection, the FERC approved the CTC amendment with an effective date of March 31, 1998. In a companion case to *Norwood* II, the First Circuit upheld the FERC's subsequent approval of NEP's later imposition of the CTC on Norwood. See *Norwood* I, 202 F.3d at 398-402.

In a move to shorten its potential liability under the CTC, Norwood next petitioned the FERC in April, 1999, for a declaratory order that its July 25, 1990, letter did not extend the term of the contract. The FERC rejected Norwood's contention and held that the town had indeed extended the contract. This ruling was subsequently upheld by the First Circuit. See *Norwood* III, 217 F.3d at 27-28.

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[2] Briefly stated, the purpose of the filed rate doctrine is to ensure that tariff rates filed with the FERC can only be challenged through the regulatory process before that agency. Moreover, such filed rates are the exclusive source of the terms and conditions by which the common carrier provides electricity to its customers. See *Norwood* II, 202 F.3d at 416.

[3] While the First Circuit agreed with Norwood that the filed rate doctrine did not bar its breach of contract claim against NEP, the court nevertheless affirmed the dismissal of that count on the basis that NEP had not breached the contract. *Norwood* II, 202 F.3d at 416-417.

[4] The amendment also allowed NEP's requirements contract customers to switch immediately to a competing supplier without the seven years' notice as provided in the original contract.

On May 18, 1998, NEP invoiced Norwood for the first installment of the CTC. To date, Norwood has not made a payment on the CTC, which, as of January 31, 2001, totaled $27,149,054.08. NEP seeks to collect what it is owed through this breach of contract action.

NEP's breach of contract claim. We review first the judge's grant of summary judgment on the breach of contract claim in favor of NEP. "The standard of review of a grant of summary judgment is whether, viewing the evidence in the light most favorable to the nonmoving party, all material facts have been established and the moving party is entitled to a judgment as a matter of law." *Route One Liquors, Inc.* v. *Secretary of Admn. & Fin.*, 439 Mass. 111, 115 (2003), quoting from *Augat, Inc.* v. *Liberty Mut. Ins. Co.*, 410 Mass. 117, 120 (1991). "An order granting or denying summary judgment will be upheld if the trial judge ruled on undisputed material facts and his ruling was correct as a matter of law." *Ibid.*, quoting from *Commonwealth* v. *One 1987 Mercury Cougar Auto.*, 413 Mass. 534, 536 (1992).

In this case, it is undisputed that Norwood entered into a valid contract with NEP that subsequently included a CTC. Norwood argues that it may elect to pay either the CTC or traditional contract damages in the event of an early termination of the agreement. We conclude, as did the judge below, that Norwood had no such option and was bound by the CTC pursuant to its contract with NEP. As the judge stated:

> "the facts show that a contract existed between Norwood and NEP, which required Norwood to pay a CTC in the event of an early termination. Norwood extended that contract, then terminated [it] before the date allowed by the contract and has not paid the CTC or any other charge as a result. Because the undisputed facts clearly point to a breach of the power contract, summary judgment must enter against Norwood on that claim."

Norwood also challenges the judge's calculation of damages following summary judgment as to liability. We agree with the judge's decision in this respect as well and conclude, as did he, that the damages here are essentially liquidated and their determination is merely a "computational exercise."[5] Appendix at 1172-73. We have also considered Norwood's arguments with respect to mitigation of damages and the inclusion of an improper interest rate in the calculation and conclude that they lack merit.[6]

Dismissal of Norwood's counterclaims. Norwood also challenges the Superior Court's order dismissing its counterclaims on the grounds of res judicata. All of the substantive issues Norwood raises on appeal either have or could have been litigated in earlier Federal cases, in which final judgment has already entered.[7]

The judge below correctly stated that res judicata prevents any further litigation of claims "that were or should have been adjudicated in [previous] action[s]." *Heacock* v. *Heacock*, 402 Mass. 21, 23 (1988). "Claim preclusion makes a valid,

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[5] The judge indicated that the calculation was based on the liquidated sum of $615,674 per month, plus contractual interest in the amount of 18 percent per year, computed from May, 1998, the first month that the CTC was billed. As of January 31, 2001, the damages, inclusive of both interest and the costs of the action, thus totalled $27,149,054.08, the amount assessed in the order for judgment on the plaintiff's motion for summary judgment.

[6] We similarly have reviewed all the supplemental filings, as well as the recent decision of the FERC that relates to this case. See *Norwood* v. *National Grid USA*, 104 FERC ¶ 61,030 (2003). Norwood's assertions to the contrary, we find nothing in the FERC Order that warrants a conclusion other than the affirmance of the Superior Court. As we read the FERC Order, any relief granted will apply to rates charged after February 21, 2003. Because NEP's complaint seeks CTC charges accumulated through January 31, 2001, the FERC order has no effect on this case.

[7] See *Norwood* I, 202 F.3d at 398-408; *Norwood* II, 202 F.3d at 414-424; *Norwood* III, 217 F.3d at 27-28.

final judgment conclusive on the parties and their privies, and prevents relitigation of all matters that were or could have been adjudicated in the action." *Blanchette* v. *School Comm. of Westwood*, 427 Mass. 176, 179 n.3 (1998). It is "based on the idea that the party to be precluded has had the incentive and opportunity to litigate the matter fully in the first lawsuit." *Heacock* v. *Heacock*, 402 Mass. at 24, quoting from *Foster* v. *Evans*, 384 Mass. 687, 696 n.10 (1981). In his memorandum of decision, the judge thoroughly articulated why each of Norwood's counterclaims were barred. See Appendix at 1030-1039. For substantially the reasons which he sets out, we conclude that the order dismissing Norwood's counterclaims properly entered. The judge aptly determined that Norwood made or could have made its counterclaim arguments in prior litigation both before the FERC and the Federal courts. "The rule of res judicata is designed to forestall a plaintiff from getting 'two bites at the apple.'" *Anderson* v. *Phoenix Inv. Counsel of Boston, Inc.*, 387 Mass. 444, 452 (1982). The judge properly dismissed Norwood's panoply of counterclaims.

Judgment affirmed.

By the Court (Rapoza, Kafker, & Green, JJ.),

/s/ [Illegible]
First Assistant Clerk

Entered: October 10, 2003.

APPENDIX B

SUPERIOR COURT OF MASSACHUSETTS

No. 982650A

NEW ENGLAND POWER COMPANY,

v.

TOWN OF NORWOOD.

March 14, 2001.

ORDER FOR JUDGMENT ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

FECTEAU.

The plaintiff, New England Power Company (NEP), brought a one-count breach of contract collection action against the defendant, Town of Norwood (Norwood) pursuant to a power contract between the parties. After extensive briefings, arguments and consideration of the above referenced motion, along with the plaintiff's motion to dismiss counterclaims and a motion by the defendants for judgment on the pleadings, NEP's motion for summary judgment was allowed, as was its motion to dismiss the counterclaims, and Norwood's motion for judgment on the pleadings was denied in a consolidated memorandum decision.

As was stated in the order therein, summary judgment as to liability was allowed in favor of the plaintiff and the parties were further invited to address the need for further proceedings to establish damages. A hearing was conducted on February 26, 2001 on this and a related issue. Upon consideration of the arguments of the parties, as well as the Rule 56 record upon which summary judgment was granted,

deciding that the defendants breached the power contract with the plaintiff by its premature termination and that such a premature termination carries with it the expense of the contract termination charge, a liquidated sum in the amount of $615,674.00 per month, plus contractual interest in the amount of 18% per year, for the reasons expressed therein as well, there does not exist a genuine issue of material fact as to the amount of damages to be assessed, as it remains merely as a computational exercise from May 1998, the first month that the contract termination charge was billed, to the present. Therefore, summary judgment as to damages is also allowed; damages are assessed, as of January 31, 2001, in the amount of twenty seven million, one hundred and forty-nine thousand, fifty-four dollars and eight cents ($27,149,054.08), which amount is inclusive of contractual interest, together with it costs of action as provided by law.

APPENDIX C

COMMONWEALTH OF MASSACHUSETTS
SUPERIOR COURT CIVIL ACTION

No. 98-2650A

NEW ENGLAND POWER COMPANY

vs.

TOWN OF NORWOOD [1]

Feb. 8, 2001

CONSOLIDATED MEMORANDUM OF DECISION AND ORDER ON 1) PLAINTIFF'S MOTION TO DISMISS COUNTERCLAIMS, 2) PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, AND 3) DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS

The plaintiff, New England Power Company (NEP), brought a one-count breach of contract collection action against the defendant, Town of Norwood (Norwood) pursuant to a power contract between the parties. Norwood answered with several affirmative defenses and fifteen counterclaims: (Count I) impossibility of performance; (Count II) frustration of purpose; (Count III) breach of contract/conversion of regulated cost of service rate to fixed price rates; (Count IV) breach of contract/termination of equal tariff No. 1 service to Norwood; (Count V) breach of contract/imposition of a contract termination charge; (Count VI) breach of contract/ not providing equal wholesale service; (Count VI) (sic) declaration that contract did not extend beyond October 31,

[1] Given the answer and counterclaims of the defendant that asserts the Norwood Municipal Light Department ("NMLD") as a party in interest, the plaintiff's motion to Add the NMLD as a party defendant is allowed.

1998; (Count VIII) misrepresentation; (Count IX) breach of the implied covenant of good faith and fair dealing; (Count X) unfair and deceptive acts and practices in violation of G.L. c. 93A, §§ 2 and 11; (Counts XI and XII) state antitrust violations; (Counts XIII and XIV) fraud and misrepresentation; and (Count XV) declaration/no meeting of the minds.

NEP now moves to dismiss Norwood's counterclaims, arguing that all of the counterclaims are barred by the *res judicata* effect of several recent federal appeals court decisions in their favor. NEP also moves for summary judgment on its breach of contract claim, alleging that, as a matter of law, it is entitled to recover from Norwood in excess of $60 million resulting from Norwood's failure to pay under their power contract. In opposition, Norwood contends that *res judicata* does not bar its counterclaims because it is entitled to raised affirmative defenses and counterclaims in connection with NEP's breach of contract claim. Finally, Norwood moves for judgment on the pleadings pursuant to Mass. R. Civ. P. 12(b)(5). For the following reasons, NEP's motion for to dismiss the counterclaims is *ALLOWED*; the motion for summary judgment is *ALLOWED* in favor of NEP and Norwood's judgment on the pleadings is *DENIED*.

BACKGROUND

New England Power Company (NEP) is a major wholesaler of electric power in New England. The Town of Norwood owns and operates a municipal utility that distributes electric power to its retail customers, most of whom are residents and businesses in the town. As it provides only distribution services, other companies must supply and transmit the power from generators to Norwood's local distribution network. These services in New England have historically been provided by "vertically integrated investor-owned" utilities like NEP, which sells power both to municipalities, like Norwood, and its own affiliates, like Massachusetts Electric.

Prior to the 1970s, Norwood purchased both generation and transmission services from Boston Edison Company. During the 1970s, however, Norwood determined that it would purchase its power from NEP, but have the power delivered, or "wheeled," over the transmission network owned by Boston Edison. Norwood brought an anti-trust suit in federal district court against the utilities in 1974 when both utilities resisted the arrangement. On April 12, 1983, the parties settled that suit and the settlement agreement was entered as a court decree.

As a result of the settlement, NEP and the Town of Norwood, via the Norwood Municipal Light Department, entered into a power contract by which NEP agreed to provide "all requirements electric service to Norwood under NEP's FERC Tariff." (Article I, Power Contract). Norwood would purchase electrical requirements from NEP through October 31, 1998 and would transmit the power over Boston Edison's network. The contract was based on NEP's Federal Energy Regulatory Commission Tariff No. 1 (the Tariff), requiring payment in "an amount calculated in accordance with NEP's FERC Tariff," defined "as [it] may be amended from time to time." The rates set on the Tariff were subject to cost of service regulation by FERC, which required that the rates would be based on NEP's actual cost of generating the electric power plus the actual costs in NEP's purchase power contract in addition to a regulated rate of return. NEP also supplied power to its own retail affiliates under that Tariff. The Tariff required that the power contract could only be terminated by written notice and that the written notice could not specify a date any earlier than seven years from the date of the notice.

Originally, the power contract provided that notice of termination could not be given until November 1, 1991 and could not specify a termination date earlier than October 31, 1998. Norwood and NEP amended the contract in 1989 to

give Norwood an option to extend the minimum term in two ten-year increments, requiring a one year notice of each such election prior to the date it is to be extended. In a letter dated July 25, 1990 sent to NEP, Norwood noticed its intention to extend the power contract pursuant to the 1989 amendment, to October 31, 2008.[2]

As part of the restructuring of the electrical service industry in Massachusetts and Rhode Island in 1996, NEP, along with its affiliates, Massachusetts Electric and Narragansett Electric, reached a settlement agreement with regulators in those states to begin to offer retail choice programs.[3] As part of the agreement, NEP agreed to divest itself of it non-nuclear generation facilities and to terminate its wholesale power purchase contracts with its retail affiliates, subject to contract termination charges. NEP filed the settlement agreement with FERC on September 30, 1996, promising to provide the commission with details of the plan no later than October 1, 1997. Norwood moved to intervene in the proceedings in December of 1996. NEP filed its notice with FERC, asserting that it had agreed to divest certain of its generating assets, while at the same time proposing to retain ownership of its transmission network, over Norwood's protests.

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[2] In ¶12 of Norwood's Amended Answer, Defenses and Counterclaim, it expressly denied that it exercised this option to extend stating in essence that its extension was not valid because NEP "had entered into an agreement to sell its generation prior to that date." The First Circuit Court of Appeals in *Norwood* v. *New England Power Company*, held that Norwood had exercised the option to extend while declining to specifically address the issue. 202 F.3d 408, 412 & n.2.

[3] The Massachusetts Legislature passed a law on November 25, 1997, requiring electric companies "to accommodate retail access to generation services and choice of suppliers by retail customers. [sic] G.L. c. 164, § 1A.

FERC approved the divestiture; revisions to the power purchase contracts between NEP and its distribution affiliates, allowing earlier termination of such contracts to achieve the stated purpose of allowing the distributors to obtain other sources of power; and approved the contract termination charges involved in the early termination of the contracts.[4] Following this approval, Norwood sent notice to NEP on March 4, 1998 terminating the contract, asserting that NEP had repudiated the power contract by its FERC filings and anticipated action following its approval. FERC later approved an application by NEP authorizing NEP's customers to terminate their contracts early upon payment of a contract termination charge. Norwood petitioned FERC for a declaratory order that its extension of the power contract had not been valid; FERC dismissed the petition, holding that the letter of July 25, 1990 did extend the power contract for ten years, effectively extending the contract between NEP and Norwood to October 31, 2008.[5]

Norwood petitioned the United States Court of Appeals for the First Circuit for review of orders from FERC which approved NEP's sale of non-nuclear generating facilities and upheld NEP's imposition of a contract termination charge on unaffiliated purchasers who sought to terminate their existing contracts prematurely.[6] The First Circuit denied these petitions, stating that: the tariff amendment allowing wholesaler to impose a contract termination charge was not inconsistent with the "stranded cost recovery" provisions adopted in prior FERC order and associated regulations; the amendment did not conflict with the *Mobile-Sierra* doctrine

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[4] See *New England Power Co.*, 82 FERC ¶ 61,179 (1998).

[5] See *New England Power Co.*, 83 FERC ¶ 61,275 (1998).

[6] *Town of Norwood* v. *FERC*, 202 F.3d 392 (1st Cir.), *cert. denied*, 121 S. Ct. 57 (U.S. Oct. 2, 2000) ("Norwood I"); *Town of Norwood* v. *FERC*, 217 F.3d 24 (1st Cir.), *petition for cert. filed*, No. 00-1025 (U.S. Dec. 22, 2000) ("Norwood III").

or the filed rate doctrine; the amendment did not conflict with Federal Power Act's requirement of just and reasonable rates; the amendment and wholesale standard offer rates, offered by electric power wholesaler only to its affiliated retailers, were not shown to violate the "undue preference" prohibition of the Federal Power Act; mere allegations of anti-competitive impact did not trigger an evidentiary hearing; and a non-profit corporation lacked standing to challenge orders approving transfer of electric generating facilities.

In an attempt to block NEP's proposed divestment of its assets, Norwood filed a breach of contract and anti-trust action in the federal district court against NEP and Pacific Gas[7] and Electric,[8] in April of 1997, asserting that NEP's conduct in relation to the power contract relieved Norwood of any obligations under the contract and entitled it to damages. In the anti-trust action, Norwood alleged that the tariffed rates it was paying for wholesale power under the power contract were higher than the rates NEP offered to its affiliates under the FERC settlement, effectively preventing Norwood from competing on equal terms. Norwood also alleged in its contract claims that by selling generation assets and revising its contracts to charge affiliates different rates and termination charges than Norwood, it breached its contract, thus relieving Norwood of performing its obligations under the contract. The court denied Norwood's motion for a preliminary injunction and summary judgment and took NEP's motion to dismiss under advisement.

The federal district court allowed NEP's motion to dismiss on the basis of the filed rate doctrine, which forbids a

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[7] Pacific Gas and Electric purchased NEP's non-nuclear generation assets.

[8] *Town of Norwood* v. *New England Power Company*, 23 F. Supp.2d 109 (D.Mass. 1998), *aff'd in part and remanded*, 202 F.3d 408 (1st Cir.), *cert. denied*, 121 S. Ct. 57 (U.S. Oct. 2, 2000) ("Norwood II").

regulated entity to charge rates for its services other than those properly filed with the appropriate federal regulatory authority. The court also dismissed the contract claims on the grounds that the contract was unambiguous in stating that the tariff could be amended by FERC and rejected the claim that the power contract required NEP to sell power under equal rates to all of its customers and affiliates. The district court also held that the contract claim was precluded by the filed rate doctrine. Norwood appealed the decision to the First Circuit.

On appeal, the dismissal of all but one count was affirmed, based on the filed rate doctrine. Although the First Circuit held that the filed rate doctrine did not bar the town's breach of contract claims against NEP, it determined that the requirements contract—the power contract—was not breached by NEP when it sold off its non-nuclear generation facilities. The Court also held that the filed rate doctrine did bar Norwood's anti-trust claim that NEP engineered a price squeeze designed to undercut Norwood's ability to compete with other power suppliers. The Court remanded Norwood's Clayton Act § 7 private action challenging the acquisition was remanded to the lower court.[9]

While the federal court cases were pending, NEP filed this breach of contract action against Norwood to collect the contract termination charge it claims it is due under the power contract. Norwood answered with several affirmative defenses and counterclaims, alleging, *inter alia*, breach of contract, violation of state anti-trust and unfair and deceptive acts or practices in NEP's actions with regard to its divestiture and FERC-approved tariff amendments; the counterclaims were amended to include counts for fraud and

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[9] The First Circuit held that Norwood is a consumer of wholesale power, the area of commerce to be impacted by the consolidation of generation assets, and has standing in court for the § 7 antitrust claim.

misrepresentation. NEP moved to dismiss all of Norwood's counterclaims based on the *res judicata* effect of the federal rulings and further moved for summary judgment on its claim of breach. Norwood moved for judgment on the pleadings.

DISCUSSION

I. *Plaintiff's Motion to Dismiss Counterclaims*

When evaluating the sufficiency of a complaint pursuant to Mass. R. Civ. P. 12(b)(6), the court must accept as true the well pleaded factual allegations of the complaint, as well as any inference which can be drawn therefrom in the plaintiff's favor. *Fairneny* v. *Savogran Co.*, 422 Mass. 469, 470 (1996); *Eyal* v. *Helen Broadcasting Corp.*, 411 Mass. 426, 429 (1981) and cases cited. "[The] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Nader* v. *Citron*, 372 Mass. 96, 98 (1977) quoting *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957).

"[A] complaint is not subject to dismissal if it would support relief on *any* theory of law." *Whitinsville Plaza, Inc.* v. *Kotseas*, 378 Mass. 85, 89 (1979). Further, a complaint should not be dismissed simply because it asserts a new or extreme theory of liability. *New England Insulation Co.* v. *General Dynamics Corp.*, 26 Mass. App. Ct. 934. 934 (1988). All inferences should be drawn in the plaintiff's favor in the complaint "so as to do substantial justice." *Ourfalian* v. *Aro Mfg. Co., Inc.*, 31 Mass. App. Ct. 294, 296 (1991).

It is settled law that in testing the correctness of a dismissal for failure to state a cognizable claim the court is to ". . . accept as true all of the allegations of the complaint and all reasonable inferences which may be drawn from the complaint. . . . Further a motion to dismiss a complaint on such grounds should not be allowed unless it appears certain that the complaining party is not entitled to relief under any

state of facts which could be proved in support of his claim." *Spinner* v. *Nutt*, 417 Mass. 549, 550 (1994); *Harhen* v. *Brown*, 46 Mass. App. Ct. 793 (1999).

Doctrine of Res Judicata

NEP argues that all counterclaims should be dismissed on the grounds that they are barred by the doctrine of *res judicata*. NEP, the defendant-in-counterclaim, contends that the claims and issues relevant to this case were or should have been litigated in the three actions previously initiated in the federal district court by Norwood and involving the same parties. The doctrine of *res judicata* or claim preclusion makes a valid, final judgment conclusive on the parties and their privies, and bars further litigation on all matters that were or should have been adjudicated in the action . . . This is so even though the claimant is prepared in a second action to present different evidence or legal theories to support his claim, or seeks different remedies. *Heacock* v. *Heacock*, 402 Mass. 21, 23 (1988), quoting *Franklin* v. *North Weymouth Coop. Bank*, 283 Mass. 275, 279-280 (1933). The doctrine of *res judicata* is "based on the idea that the party to be precluded has had the incentive and opportunity to litigate the matter fully in the first lawsuit." *Id.* at 24, quoting *Foster* v. *Evans*, 384 Mass. 687, 696 n.10 (1981). A final judgment on the merits of an action precludes the parties or their privies from re-litigating issues that were or could have been raised in that action. *Manego* v. *Orleans Board of Trade*, 773 F.2d 1, 5 (1st Cir. 1985). In Massachusetts, a dismissal under Rule 12(b)(6) operates as a binding adjudication on the merits, with res judicata effect. See *Mestek, Inc.* v. *United Pacific Ins. Co.*, 40 Mass. App. Ct. 728, 731 (1996).

A motion to dismiss for failure to state a claim may be granted on the basis of *res judicata* or collateral estoppel. *Barrett* v. *Transformer Service, Inc.*, 374 Mass. 704, 715-16 (1978). Although *res judicata* is most properly an affirmative

defense to be raised by answer, in certain circumstances, it can be presented in a rule 12(b)(6) context where all of the materials necessary for the decision are official records available to the judge ruling on the motion and not subject to dispute, and can be read together with the complaint. See *Boyd* v. *Jamaica Plain Cooperative Bank*, 7 Mass. App. Ct. 153, 157 n.7 (1979), and cases cited. For the doctrine of *res judicata* to bar an action, three elements are required: (1) identity or privity of the parties to the present and prior actions; (2) the identity of the causes of action [are the same]; and (3) [there was] a prior final judgment on the merits. *Gloucester Marine Rys. Corp.* v. *Charles Parisi, Inc.*, 36 Mass. App. Ct. 386, 390 (1994); *Franklin* v. *North Weymouth Coop. Bank*, *supra* at 280.

NEP argues in its motion to dismiss that all of Norwood's contentions are barred by *res judicata* because they have been made or could have been made in proceedings Norwood brought before both the federal courts and FERC and that all allegations arise out of the same transaction. This court will now consider each counterclaim, or group of counterclaims, seriatim.

A. Counterclaim/Counts I and II—Impossibility of Performance and Frustration of Purpose

Counts I and II allege that NEP's sale of its non-nuclear generational plants constituted a repudiation of its power contract with Norwood and that such transactions both frustrated the purpose of the contract and made it impossible to perform. In its supporting memorandum, Norwood agrees that it first raised the impossibility issue in its second amended complaint before the federal district court, but argues that because the action was dismissed, it was not decided on the merits. The underlying issue, however, was dealt with by the First Circuit: "Accordingly, we agree with the district court that the contract did not contain a promise

that ownership of New England Power's facilities or equality of treatment vis a vis New England Power's affiliates would endure." *Norwood II*, 202 F.3d at 417. Noting that Norwood had not sufficiently developed an argument for frustration of purpose, the court sidestepped a specific holding—but noted the decidedly difficult path facing Norwood on that claim since New England Power had continued to offer Norwood a cost-based, long-term supply of electricity, subject to FERC regulation. Because Norwood made, or could have made, both allegations in its federal case against NEP and had the opportunity to develop its argument before both the district and the appeals court, Counts I and II are therefore barred by *res judicata* and must be dismissed. *Id.*

B. Counterclaim/Counts III-VI—Breach of Contract

Counts III, IV, V, and VI all allege that NEP breached the contract by various actions: converting Norwood's regulated cost of service rate to fixed price rates; termination of equal tariff No. 1 service to Norwood; imposition of a contract termination charge; and by not providing equal wholesale service. In Counts V and VII,[10] Norwood contends that it never validly exercised its option to extend the power contract beyond October 31, 1998 and so claims that any imposition of a contract termination charge beyond that date is a breach of contract.

In *Norwood II*, which decided various contract and anti-trust claims, Norwood contended that NEP violated the power contract by ". . . divesting itself of its generating facilities, shifting Norwood to a fixed rate based on pre-divestiture costs, and proposing to serve its own affiliates on a quite different basis than the fixed rate (namely market-based rates subject to the availability of the initially low-cost wholesale

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[10] Paragraphs 56-60 of the Counterclaim will be treated as Count VII, as it follows Count VI and precedes Count VIII. It was apparently mislabeled "Count VI."

standard offer service)." 202 F.3d at 414. These claims are strikingly similar to the claims Norwood makes in Count III, "NEP breached the Contract by converting it from a cost of service arrangement regulated by the FERC to a fixed price contract," in Count IV, "NEP breached its Power Contract with NMLD by unilaterally terminating Tariff 1," and in Count VI, alleging NEP violated the Contract by offering a separate wholesale rate only to its affiliate and excluded Norwood.

The First Circuit found that Norwood would have difficulty arguing that it was assuming the contract to provide something it did not when "New England Power has continued to offer Norwood the gist of what it was promised: a cost-based, long-term supply of electricity, subject to FERC regulation." *Norwood II*, 202 F.3d at 417. In considering Norwood's breach of contract claims, the court agreed with the district court that NEP did not breach the contract because the power contract did not contain a promise that ownership of NEP's facilities or equality of treatment as with its affiliates would continue. *Id.*

The remaining breach of contract claims, Count V, alleging that NEP breached the contract by asking FERC to approve an early termination charge; Count VI, alleging that NEP's assertion that the power contract extends beyond October 31, 1998 was a breach; and Count VIII, alleging that NEP made various misrepresentations to Norwood affecting the contract, all arose from the same transaction—the power contract and NEP's FERC-approved changes to the tariff. All of the claims or theories based on breach of the power contract that Norwood now counters with in the present action, therefore, could have or should have been raised in the federal court action because all of the claims arose from the same "transaction or series of connected transactions" out of which Norwood's claims in its federal actions arose. See *Manego*, *supra*; see also *Massachusetts School of Law* v. *American*

Bar Ass'n, 142 F.3d 26, 38 (1st Cir. 1998) (holding that federal court may exercise jurisdiction over state law claim arising from the "same operative facts"). As there has been a final judgment on the merits in those cases, Norwood must now be barred from attempting to re-litigate the claims in this action. See *Gloucester Marine*, 36 Mass. App. Ct. at 390. Counts III, IV, V, VI and VII are therefore barred by the res judicata effect of those First Circuit decisions.

C. Count VIII—Misrepresentation

Count VIII asserts that various legal positions taken by Norwood relating to the power contract constituted misrepresentations. Norwood alleges that through NEP's misrepresentations, Norwood was lead to believe that the extension to October 31, 2008 was valid and that NEP misrepresented to FERC regarding the contract termination charge. In the federal action, Norwood challenged both the extension to the power contract, see *Norwood III*, 217 F.3d at 27, and the validity of the contract termination charge, see *Norwood I*, 202 F.3d at 398. Although both issues were decided on the merits in the respective cases in favor of NEP, what now bars Norwood from bringing the claims in this action is that they arise from the same "transaction or series of connected transactions" out of which Norwood's claims in its federal actions arose. See *Manego*, *supra*. Norwood's allegations of misrepresentation, Count VIII, are therefore dismissed.

D. Count IX—Breach of the implied covenant of good faith and fair dealing

Here, Norwood alleges that NEP breach the implied covenant of good faith and fair dealing by engaging in conduct in disregard of the power contract and by making misrepresentations. The allegations in this claim clearly refer to NEP's actions taken with regard to the power

contract—actions detailed in the other counterclaims, and describing what forms the basis for Norwood's federal actions. The federal judgment is res judicata with respect to all state claims arising out of the same transaction, for which the federal court could have exercised jurisdiction. See *Massachusetts School of Law*, *supra* at 38.

E. Count X—Unfair and Deceptive Acts and Practices in violation of G.L. c. 93A, §§ 2 and 11

In Count X, Norwood alleges a violation of G.L. c. 93A by NEP, by disregarding its known contractual arrangements and in so doing, securing benefits for itself, its misrepresentations and its breach of the implied covenant of good faith and fair dealing (Counts VIII and IX, respectively). As the two counts that it alleged to have supported its claim of unfair or deceptive acts or practices are barred by *res judicata*, see Discussion Counts VII-IX, *supra*, so too is Norwood's counterclaim of 93A. This theory arises from the same operative facts as the claims asserted before the federal courts and FERC, and could have been asserted in the federal court action. See *Massachusetts School of Law*, *supra*.

F. Counts XI and XII—Violation of the Massachusetts Antitrust Act

Norwood made two antitrust claims in its counterclaim in this action: that NEP violated G.L. c. 93 by designing a price fixing scheme by not offering the standard offer rates to Norwood that it promised to other retailers; and that NEP has imposed an "improper anti-competitive burden" on Norwood by charging a contract termination charge higher than those NEP charged to its other affiliates, resulting in an [sic] "price squeeze." The same claims were made under federal antitrust law in the federal action between Norwood and NEP. See *Norwood II*, 202 F.2d at 417-424. The federal claims were ruled upon by the First

Circuit, when it affirmed the district court's decision dismissing the price fixing and price squeezing claims."[11] *Id.* Reasoning that Norwood is not seriously threatened as a competitor because it has no obligation to give its captive customers access to other suppliers, see *id.* at 421, and that the filed rate doctrine prevented Norwood from bringing the Section 2 claims, the court declined to carve out an exception to the doctrine and dismissed the claims. *Id.*, citing *Square D. Co.* v. *Niagara Frontier Tariff Bureau*, 476 U.S. 409 (1986) (applying the filed rate doctrine to anti-trust claims). Norwood is "primarily a consumer challenging a filed rate that it does not want to pay (the contract termination charge), and . . . its position as a "competitor" is qualified." 202 F.3d at 420.

Under the federal court's pendant jurisdiction, Norwood should have asserted its state law anti-trust claims in the federal action. See *Massachusetts School of Law* 142 F.3d at 38 (dismissing new state law claims and holding that federal court exercising federal question jurisdiction may also assert supplemental jurisdiction over state law claims). As such, because they arose out of the same transaction as the federal anti-trust claims, the claims in Norwood's counterclaim are barred by the final judgment in the federal court case.

G. Counterclaim/Counts XIII-XV—Fraud and Misrepresentation, No Meeting of the Minds

In these claims, added in its Amended Counterclaims, Norwood asserts claims involving the 1987 and 1989 Amendments to the power contract that it signed, alleging that NEP offered false statements when proposing the

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[11] Only one count of the complaint in the federal court, concerning a claim of Section 7 of the Clayton Act, was not dismissed, but remanded to the district court for further proceedings; as that claim cannot be litigated here, it has no effect on the state law anti-trust claims.

amendments to Norwood. In particular, it alleges that because NEP retained the seven-year notice of termination (as did Norwood) from the original contract, any future option to extend the contract that it was agreeing to under those amendments was deceptive. The 1987 Amendment was designed to allow Norwood to reduce its obligation to purchase from New England Power to the extent that Norwood could obtain a lower cost allocation from the New York Power Authority. See *Norwood III*, 217 F.3d at 28. The 1989 Amendment specified the term of the power contract, replacing a provision that made it self-extending absent notice of termination; it extended the power contract through midnight, October 31, 1998 with two exceptions relating to notice of extensions and periods of extension.[12] These counterclaims are based on a contract interpretation argument NEP made in one of its appellate briefs concerning the effect of certain contract amendments on extension of the contract termination date. Norwood asserts that because the brief introduces newly discovered evidence, it is entitled to discovery on these counts and its claim relates specifically to the parties' understanding of two amendments to the power contract pertaining to extensions. The target of Count XV is both the aforementioned amendments and the July 25, 1990 extension letter sent by Norwood to NEP extending the power contract; Norwood alleges because each party had different understandings of the meaning of the amend-

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[12] Specifically the amendment provided that: (1) neither side could give notice of termination prior to November 1, 1991, or specify a termination date prior to November 1, 1998; and (2) Norwood may elect to extend the earliest date by which either party can give notice of intent to terminate service by a total of [twenty years] in two ten-year increments. In order to exercise this election, Norwood agrees to provide [New England Power] with written notice of each such election at least one year prior to the date that it is to be extended, viz, November 1, 2001 initially and to November 1, 2011.

ments, there was no meeting of the minds as to the July 25, 1990 letter.

Norwood advanced several theories concerning extension of the power contract in its petition to the First Circuit of the FERC ruling. The First Circuit ruling affirmed FERC's order that Norwood's contract extension was valid and had the effect of extending the date for giving notice of termination. *Norwood III*, 217 F.3d 24. "Norwood's July 25, 1990 letter triggered a provision in the 1989 amendment to the original 1983 contract and when both the amendment and the letter are considered, it is crystal clear that . . . Norwood's obligation was extended through October 31, 2008." *Id.* at 27. This certainly has a res judicata effect on Norwood's present effort's [sic] to litigate a claim of no meeting of the minds on the letter. Further, that decision on the merits of the contract extension considered the earlier amendments between Norwood and NEP and any argument or theory concerning the validity of such should have been raised at that level. Counts XIII and XIV of Norwood's counterclaim are likewise dismissed.

II. *Defendant's Motion for Summary Judgment*

Summary judgment shall be granted where there are no genuine issues as to any material fact and where the moving party is entitled to judgment as a matter of law. *Kourouvacilis* v. *General Motors Corp.*, 410 Mass. 706, 716 (1991); *Cassesso* v. *Commn'r of Correction*, 390 Mass. 419, 422 (1983); *Community Nat'l. Bank* v. *Dawes*, 369 Mass. 550, 553 (1976); Mass. R. Civ. P. 56(c). The moving party bears the burden of affirmatively demonstrating the absence of a triable issue, and further, that the "moving party is entitled to judgment as a matter of law." *Pederson* v. *Time Inc.*, 404 Mass. 14, 16-17 (1989). Where both parties have moved for summary judgment and "in essence there is no real dispute as to the

salient facts or if only a question of law is involved," summary judgment shall be granted to the party entitled to judgment as a matter of law. *Cassesso, supra.*

To prevail on summary judgment, the moving party must establish that there is no genuine issue of material fact on every element of a claim and that it is entitled to judgment on the claim as a matter of law. See generally Mass. R. Civ. P. 56(c); *Highlands Insurance Co.* v. *Aerovox, Inc.*, 424 Mass. 226, 232 (1997); *Cassesso* v. *Commissioner of Correction*, 390 Mass. 419, 422 (1983). The moving party bears the burden of affirmatively demonstrating that there is no genuine issue of material fact on every relevant issue. *Pederson* v. *Time, Inc.*, 404 Mass. 14, 17 (1989). Once the moving party has established the absence of a triable issue, the party opposing the motion must respond and allege specific facts establishing the existence of a genuine issue of material fact. *Id.*

Breach of Contract

Under Massachusetts law, interpretation of a contract is ordinarily a question of law for the court. *Allstate Insurance Co.* v. *Bearce*, 412 Mass. 442, 446-47 (1992); *Freelander* v. *G. & K. Realty Corp.*, 357 Mass. 512, 516 (1970). An unambiguous contract must be enforced according to its terms and the subjective contemplations of the parties are immaterial. *Schwanbeck* v. *Federal-Mogul Corp.*, 412 Mass. 703, 706 (1992), citing *Freelander, supra* at 516; *Blakeley* v. *Pilgrim Packing Co.*, 4 Mass. App. Ct. 19, 24 (1976). Parties are bound by the plain terms of their contract. *Forte* v. *Caruso*, 336 Mass. 476, 480-81 (1957); *Hiller* v. *Submarine Signal Co.*, 325 Mass. 546, 550 (1950). The question is whether the actions of Norwood, as described by NEP and considered in the light most favorable to Norwood, amount to a breach of contract. Summary judgment is an appropriate vehicle for judicial

interpretation because the court may interpret the meaning of the contract as a matter of law. See *ER Holdings, Inc.* v. *Norton Co.*, 735 F.Supp. 1094, 1097 (D.Mass. 1990).

NEP and Norwood

In its motion, NEP contends that there is no dispute to the facts material to determining that Norwood failed to fulfill its obligations under the power purchase contract. NEP urges that a contract to purchase power between it and Norwood existed, under which contract power would be purchased under a FERC-approved, amendable tariff. It is further undisputed, NEP asserts, that the tariff requires a contract termination charge (CTC) of Norwood in order to terminate early, that Norwood did terminate early and that Norwood has not paid the termination charge.

The crux of Norwood's arguments opposing summary judgment is that it should not have to pay the CTC because no court before which it has appeared in related actions found it to have breached the power contract, asserting that it never exercised the option to pay the termination charge and had no obligation to do so. Norwood further reiterates its opposition to the dismissal of its counterclaims, see discussion *supra*, that its affirmative defenses and counterclaims cannot be barred by *res judicata*. Finally, Norwood asserts that NEP is barred by its own theory of *res judicata*, which Norwood contends, if viable, must operate equally to prevent NEP from bringing this contract action under the theory of pendent jurisdiction.[13]

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[13] Norwood also argued in its opposition that the pendency of its petitions for certiorari of the first two First Circuit decisions, *Norwood I* and *Norwood II*, alters the res judicata effect of the rulings. Since that the time Norwood submitted the opposition, both cases were denied certiorari. *Town of Norwood* v. *FERC*, 202 F.3d 392 (1st Cir.), *cert. denied*, 121 S. Ct. 57 (U.S. Oct. 2, 2000) (Norwood I); *Town of Norwood* v. *New England Power Company*, 202 F.3d 408 (1st Cir.), *cert. denied*, 121 S. Ct.

Norwood contends that because none of the federal rulings addressed whether it breached the contract, such an issue cannot be decided by this court on summary judgment. Even if none of the federal court rulings had conclusively determined whether Norwood breached the contract, this court may certainly do so, as all facts material to a breach are undisputed or have been adjudicated by FERC and the federal courts. Norwood asserts that the First Circuit in *Norwood I* describes the CTC as an option—one that it could opt to exercise or not. Norwood simply decided not to exercise the option and hence, not be responsible to pay any charge in connection with its termination of the contract. See *Norwood I*, 202 F.3d at 400. NEP counters that the CTC was an option only in the sense that Norwood had an option whether or not to terminate its contract early. This court agrees with that interpretation. A better reading of the opinion shows that the CTC was an option only in the sense that Norwood could elect not to take it only by remaining in the contract. Given the option to pay a charge or decide not to, it is obvious that no one would choose to pay; the CTC is more akin to a *quid pro quo* for terminating the contract early. For Norwood to argue that it had the option to terminate the power contract early and had an independent option to pay or not pay the contract termination charge imposed for the premature termination is simply inconsistent with a common sense reading of the CTC. The clear and natural import of the contract termination charge is that, upon the election to terminate the contract prematurely, the contract termination charge is imposed.

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57 (U.S. Oct. 2, 2000) (Norwood II). Petition for certiorari was filed in *Norwood III*, and is still pending, however that does not affect the full force of the judgment in the case. See *In re Belmont Realty Corp.*, 11 F.3d 1092, 1095 (1st Cir. 1993).

Norwood also asserts that NEP was required to assert its breach of contract claim as a compulsory counterclaim in the federal court proceedings against it (*Norwood II*) and as result of its failure to do so, is now barred from raising the claim in the present action. NEP counters that, because the federal case was disposed of on its motion to dismiss, it was never required to file a compulsory counterclaim and that its claim for payment under the contract did not arise until after its motion to dismiss was filed.

Under Rule 13(a) of the Federal Rules of Civil Procedure, parties are required to set forth any counterclaims in the parties' pleadings. Because NEP filed a motion to dismiss in the federal action against it, *Norwood II*, and never filed a responsive pleading, NEP was not required to file a compulsory counterclaim. See e.g., *Bluegrass Hosiery, Inc.* v. *Speizman Industries, Inc.* 214 F.3d 770, 772 (6th Cir. 2000); *United States* v. *Snider*, 779 F.2d 1151, 1157 (6th Cir.); *Mellon Bank, N.A.* v. *Ternisky*, 999 F.2d 791, 795 (4th Cir.). The rule seeks to assure that a claim is valid, pending the ruling on the motion to dismiss, before allowing any counterclaims—permissive or compulsory.

Norwood cites several federal cases in support of its argument; however, the factual circumstances in those cases are clearly inapposite to the case at bar. The case of *Rodriguez* v. *Doral Mortgage Corp.*, 57 F.3d 1168 (1st Cir. 1995), stands for the proposition that pendent jurisdiction of the federal court allows adjudication of related state law counterclaims, while *Bay State HMO Management, Inc.* v. *Tingley Systems, Inc.*, 181 F.3d 174 (1st Cir. 1999) rightly states that parties are precluded from re-litigating claims that were or could have been raised in an earlier action between them that resulted in a final judgment on the merits. Several other cases espoused the requirements of counterclaims, all correctly so. Norwood neglects to recognize, however, that because NEP filed a motion to

dismiss in lieu of a responsive pleading, as defined in Fed. R. Civ. P. 7(a), and the motion to dismiss was granted, Fed. R. Civ. P. 13, the rule governing compulsory counterclaims, will not bar NEP from asserting the contract claim in this action.

Viewing the facts in the light most favorable to Norwood, the non-moving party, it is undisputed that a written power contract existed between NEP and Norwood by which Norwood agreed to purchase electric requirements from NEP. The contract required payment in "an amount calculated in accordance with NEP's FERC Tariff," defined in the contract as the FERC Tariff No. 1 filed by NEP "as may be amended from time to time." Under the tariff and therefore, the terms of the contract, the parties were required to give written notice of any intent to terminate the contract and could not do so earlier than seven years from the date of notice. The parties amended the agreement in 1987 and in 1989, setting specific dates upon which notice of termination and notice of extension of the contract could be given. Norwood exercised its option to extend the power contract on July 25, 1990, in a letter to NEP, stating, *inter alia*, that, "[t]he effect of this is that the Power Contract between [NEP] and Norwood would be extended for ten years to midnight, October 31, 2008. [sic] See *Norwood III*, 217 F.3d at 27. Norwood, claiming NEP vitiated the contract, opposed all of the actions NEP undertook in its deregulation efforts—converting Norwood's regulated cost of service rate to fixed price rates; termination of equal tariff No. 1 service to Norwood; imposition of a contract termination charge; and not providing equal wholesale service to all its customers, and brought its concerns to FERC and the federal courts. The First Circuit dismissed all relevant claims against NEP, however, and agreed that no promises had been broken. See generally *Norwood I*; *Norwood II*; *Norwood III*.

On March 4, 1998 Norwood sent a letter to NEP, terminating the power contract effective April 1, 1998. NEP filed with FERC on March 18, 1998 to revise Tariff No. 1 to allow Norwood and other power customers to terminate early, on a 30-day notice, but would required payment of the CTC, which would be calculated through the life of the contract if the customer had not terminated early. The amendments to the tariff were approved by FERC on May 15, 1998. On May 18, 1998, NEP sent Norwood an invoice for its first installment of the CTC, which Norwood did not pay. It has similarly refused to pay any of the invoices sent to it by NEP since that date.

The facts show that a contract existed between Norwood and NEP, which required Norwood to pay a CTC in the event of an early termination. Norwood extended that contract, then terminated before the date allowed by the contract and has not paid the CTC or any other charge as a result.[14] Because the undisputed facts clearly point to a

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[14] The only other logical theory behind Norwood's claim that it did not exercise the option to pay a contract termination charge is that Norwood did not elect to terminate prematurely under the 1998 tariff amendment—that its notice of termination of March 4, 1998, was for the alleged breach by NEP. Carrying this theory to its logical conclusion, based upon the Rule 56 record, if NEP did not reach its contract with Norwood, then its notice of termination was ineffective to terminate the contract, and any termination by Norwood would thus be a breach of the original 1983 contract, as amended, since it terminated the service without having provided a seven year notice. Under the 1989 amendment, and as extended by the July 25, 1990, notice of extension, the earliest such a seven year notice of termination could be effective is November 1, 2001, to allow for a termination by October 31, 2008. Under this theory, then, Norwood would be liable to NEP for damages in contract for the unexpired portion of the contract, less any mitigation of damages, such as avoided costs of production, much like the contract termination charge. Whether under this theory or for failure to pay the contract termination charge, NEP has been found not to have breached the contract, Norwood has breached the contract by having terminated the contract prematurely without right, that such premature termination comes at the expense of a

breach of the power contract, summary judgment must enter against Norwood on that claim. Given this ruling, the defendant's Motion for Judgment on the Pleadings is denied.

ORDER

For the foregoing reasons, it is hereby *ORDERED* that plaintiff's motion to dismiss counterclaims is *ALLOWED*. It is further *ORDERED* that plaintiff's motion for summary judgment as to liability is *ALLOWED* and defendant's motion for judgment on the pleadings is *DENIED*.

Plaintiff has filed a motion to require the defendant to post a bond due to the extraordinary costs incurred and to be incurred, toward which Norwood has paid nothing. The parties may prepare and file supplemental briefs on this issue by February 23, 2001, and a hearing is scheduled for February 26, 2001, at 3:00 p.m. to determine whether to impose such a bond, if so, in what amount. The necessity and nature of such further proceedings to establish damages for the entry of judgment may also be briefed and shall be heard at the same time.[15]

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contract termination charge, and that Norwood has paid neither the termination charge nor any other payments contractually due to NEP.

[15] According to the plaintiff's complaint, the defendant has incurred a monthly contract termination charge in the amount of $615,674.00, per month, since May, 1998, to the present, and that this same amount shall be incurred hereafter. As in the proceedings before FERC and the First Circuit, Norwood has only argued that the CTC should be rejected *in toto*, and has not put forward any disputed facts as to the calculation of the charge, nor has it sought to challenge the justness or reasonableness of the substance of the charge before FERC by filing a "section 206 complaint," as permitted under the Federal Power Act, 16 U.S.C. 824e, as noted by FERC and the Court of Appeals. See *Town of Norwood* v. *F.E.R.C.*, 202 F. 3d 392, 401 (1st Cir., 2000). Given the jurisdiction and prior rulings of FERC and the Court of Appeals, it is not open to Norwood to do so herein. Indeed, Norwood has stated, in its Memorandum in Opposition to

/s/ Francis R. Fecteau
FRANCIS R. FECTEAU
Justice of the Superior Court

DATED: February 8, 2001

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the Plaintiff's Motion for Summary Judgment, that it may do so (at p.4, fn.2). It appears that it has not yet done so.

APPENDIX D

SUPREME JUDICIAL COURT FOR THE
COMMONWEALTH OF MASSACHUSETTS
One Beacon Street, Third Floor, Boston,
Massachusetts 02108
(617) 557-1020

Alan K. Posner, Esquire
Rubin & Rudman
50 Rowes Wharf
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RE: Docket No. FAR-13747

NEW ENGLAND POWER COMPANY

vs.

TOWN OF NORWOOD & another

Worcester Superior Court No. WOCV1998-02650
A.C. No. 2001-P-1467

NOTICE OF DENIAL OF F.A.R. APPLICATION

Please take note that on 11/25/03, the above-captioned Application for Further Appellate Review was denied.

Susan Mellen, Clerk

Dated: November 25, 2003

To: Michael P. Angelini, Esquire
John F. Sherman, III, Esquire
Alan K. Posner, Esquire
Atty. Charles F. Wheatley, Jr.
Atty. Robert V. Zener

APPENDIX E

FEDERAL STATUTES

16 U.S.C. § 824d. Rates and charges; schedules; suspension of new rates; automatic adjustment clauses

(a) Just and reasonable rates

All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) Preference or advantage unlawful

No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Schedules

Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Notice required for rate changes

Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after sixty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the sixty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Suspension of new rates; hearings; five-month period

Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service

shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

(f) Review of automatic adjustment clauses and public utility practices; action by Commission; "automatic adjustment clause" defined

(1) Not later than 2 years after November 9, 1978, and not less often than every 4 years thereafter, the Commission shall make a thorough review of automatic adjustment clauses in public utility rate schedules to examine—

(A) whether or not each such clause effectively provides incentives for efficient use of resources (including economical purchase and use of fuel and electric energy), and

(B) whether any such clause reflects any costs other than costs which are—

(i) subject to periodic fluctuations and

(ii) not susceptible to precise determinations in rate cases prior to the time such costs are incurred.

Such review may take place in individual rate proceedings or in generic or other separate proceedings applicable to one or more utilities.

(2) Not less frequently than every 2 years, in rate proceedings or in generic or other separate proceedings, the Commission shall review, with respect to each public utility, practices under any automatic adjustment clauses of such utility to insure efficient use of resources (including economical purchase and use of fuel and electric energy) under such clauses.

(3) The Commission may, on its own motion or upon complaint, after an opportunity for an evidentiary hearing, order a public utility to—

(A) modify the terms and provisions of any automatic adjustment clause, or

(B) cease any practice in connection with the clause,

if such clause or practice does not result in the economical purchase and use of fuel, electric energy, or other items, the cost of which is included in any rate schedule under an automatic adjustment clause.

(4) As used in this subsection, the term "automatic adjustment clause" means a provision of a rate schedule which provides for increases or decreases (or both), without prior hearing, in rates reflecting increases or decreases (or both) in costs incurred by an electric utility. Such term does not include any rate which takes effect subject to refund and subject to a later determination of the appropriate amount of such rate.

(June 10, 1920, c. 285, § 205, as added Aug. 26, 1935, c. 687, Title II, § 213, 49 Stat. 851, and amended Nov. 9, 1978, Pub.L. 95-617, Title II, §§ 207(a), 208, 92 Stat. 3142.)

16 U.S.C. § 824e. Power of Commission to fix rates and charges; determination of cost of production or transmission

(a) Unjust or preferential rates, etc.; statement of reasons for changes; hearing; specification of issues

Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. Any complaint or motion of the Commission to initiate a proceeding under this section shall state the change or changes to be made in the rate, charge, classification, rule, regulation, practice, or contract then in force, and the reasons for any proposed change or changes therein. If, after review of any motion or complaint and answer, the Commission shall decide to hold a hearing, it shall fix by order the time and place of such hearing and shall specify the issues to be adjudicated.

(b) Refund effective date; preferential proceedings; statement of reasons for delay; burden of proof; scope of refund order; refund orders in cases of dilatory behavior; interest

Whenever the Commission institutes a proceeding under this section, the Commission shall establish a refund effective date. In the case of a proceeding instituted on complaint, the refund effective date shall not be earlier than the date 60 days after the filing of such complaint nor later than 5 months after the expiration of such 60-day period. In the case of a proceeding instituted by the Commission on its own motion, the refund effective date shall not be earlier than the date 60

days after the publication by the Commission of notice of its intention to initiate such proceeding nor later than 5 months after the expiration of such 60-day period. Upon institution of a proceeding under this section, the Commission shall give to the decision of such proceeding the same preference as provided under section 824d of this title and otherwise act as speedily as possible. If no final decision is rendered by the refund effective date or by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to this section, whichever is earlier, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such decision. In any proceeding under this section, the burden of proof to show that any rate, charge, classification, rule, regulation, practice, or contract is unjust, unreasonable, unduly discriminatory, or preferential shall be upon the Commission or the complainant. At the conclusion of any proceeding under this section, the Commission may order the public utility to make refunds of any amounts paid, for the period subsequent to the refund effective date through a date fifteen months after such refund effective date, in excess of those which would have been paid under the just and reasonable rate, charge, classification, rule, regulation, practice, or contract which the Commission orders to be thereafter observed and in force: *Provided*, That if the proceeding is not concluded within fifteen months after the refund effective date and if the Commission determines at the conclusion of the proceeding that the proceeding was not resolved within the fifteen-month period primarily because of dilatory behavior by the public utility, the Commission may order refunds of any or all amounts paid for the period subsequent to the refund effective date and prior to the conclusion of the proceeding. The refunds shall be made, with interest, to those persons who have paid those rates or charges which are the subject of the proceeding.

(c) Refund considerations; shifting costs; reduction in revenues; "electric utility companies" and "registered holding company" defined

Notwithstanding subsection (b) of this section, in a proceeding commenced under this section involving two or more electric utility companies of a registered holding company, refunds which might otherwise be payable under subsection (b) of this section shall not be ordered to the extent that such refunds would result from any portion of a Commission order that (1) requires a decrease in system production or transmission costs to be paid by one or more of such electric companies; and (2) is based upon a determination that the amount of such decrease should be paid through an increase in the costs to be paid by other electric utility companies of such registered holding company: *Provided,* That refunds, in whole or in part, may be ordered by the Commission if it determines that the registered holding company would not experience any reduction in revenues which results from an inability of an electric utility company of the holding company to recover such increase in costs for the period between the refund effective date and the effective date of the Commission's order. For purposes of this subsection, the terms "electric utility companies" and "registered holding company" shall have the same meanings as provided in the Public Utility Holding Company Act of 1935, as amended [15 U.S.C. § 79 et seq.].

(d) Investigation of costs

The Commission upon its own motion, or upon the request of any State commission whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transmission of electric energy by means of facilities under the jurisdiction of the Commission in cases where the Commission has no authority to establish a rate governing the sale of such energy.

(June 10, 1920, c. 285, § 206, as added Aug. 26, 1935, c. 687, Title II, § 213, 49 Stat. 852, and amended Oct. 6, 1988, Pub.L. 100-473, § 2, 102 Stat. 2299.)

APPENDIX F

FEDERAL ENERGY REGULATORY COMMISSION

Commission Opinions, Orders and Notices

Before Commissioners: Pat Wood, III, Chairman; William L. Massey, and Nora Mead Brownell.

Docket No. EL03-37-000

TOWN OF NORWOOD, MASSACHUSETTS

v.

NATIONAL GRID USA
NEW ENGLAND ELECTRIC SYSTEM
MASSACHUSETTS ELECTRIC COMPANY AND NARRAGANSETT ELECTRIC LIGHT COMPANY

ORDER SETTING COMPLAINT FOR HEARING IN PART AND DISMISSING IT IN PART AND ESTABLISHING SETTLEMENT JUDGE PROCEDURES

(Issued July 2, 2003)

Summary

1. This order sets for hearing in part and dismisses in part a complaint that the Town of Norwood, Massachusetts (Norwood) filed against National Grid USA, et al. (National Grid) concerning a contract termination charge (CTC) that New England Power Company (NEPCO) seeks to collect from Norwood. This order benefits customers by ensuring that the CTC is calculated correctly.

Background

The Parties

2. Norwood is a municipality that owns and operates a municipal utility that distributes retail electric energy to residents and businesses in the town. National Grid is an electric utility that sells, transmits and distributes electric energy. In 1998, National Grid acquired the New England Electric System and its subsidiaries.

3. New England Power Company (NEPCO) is a subsidiary of the New England Electric System, which also owns four retail distribution companies, including Massachusetts Electric Company, (Mass Electric) serving Massachusetts, and Narragansett Electric Company (Narragansett), serving Rhode Island. NEPCO sells wholesale electric energy that it generates or buys from others to both affiliates, such as Mass Electric and Narragansett, and to other wholesale customers (with which it is not affiliated), such as Norwood.

The CTC

4. The CTC arose out of a series of transactions in which NEPCO restructured itself to accommodate customer choice and market-based pricing in New England at both the wholesale and retail levels.[1] A knowledge of this history is essential to understanding the parties' arguments regarding the CTC.

5. For many years NEPCO provided wholesale requirements service under its Tariff No. 1 to its retail distribution affiliates, Mass Electric and Narragansett. In 1983, the Commission accepted a service agreement under Tariff No. 1 for full requirements service between NEPCO and Norwood, which placed Norwood on a comparable basis with Mass

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[1] *See Town of Norwood v. FERC*, 202 F.3d 392, 396-97 (1st Cir. 2000), *cert. denied*, 531 U.S. 818 (*Norwood I*); *Town of Norwood v. FERC*, 212 F.3d 24, 26 (1st Cir. 2000), *cert. denied*, 532 U.S. 993 (2000) (*Norwood III*); Answer to Complaint at 7.

Electric in Massachusetts and Narragansett in Rhode Island.[2] Although under Tariff No. 1 Norwood received its electric energy from NEPCO, it received its transmission services from Boston Edison.

6. The service agreement between NEPCO and Norwood under Tariff No.1 obligated NEPCO to supply full requirements electric service to Norwood under the tariff, "as [it] may be amended from time to time."[3] Norwood's service agreement was for an initial term of fifteen years, terminating on October 31, 1998, with a requirement for seven years' prior notice to effect a termination. In 1989, the parties amended their contract to permit Norwood at its election to extend the earliest date on which either party could give notice of termination from November 1, 1991 to November 1, 2001.

7. On July 25, 1990, Norwood sent a letter to New England Power stating that it "hereby gives notice... that it extends the date" for giving notice of termination of the service agreement from November 1, 1991, to November 1, 2001.[4] Norwood further stated that "the effect of this [letter] is that the Power Contract between [NEPCO] and Norwood would be extended for [ten] years to midnight, October 31, 2008."[5]

8. In December 1996, NEPCO made several filings with the Commission to: (a) restructure itself; (b) revise its wholesale

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[2] *See New England Power Company*, 83 FERC ¶ 61,174 at 61723-24, *reh'g denied*, 84 FERC ¶ 61,175 (1998); *aff'd Norwood I*. The service agreement resolved an antitrust case that Norwood brought against Boston Edison Company (Boston Edison) (from whom Norwood had been purchasing electric energy) and NEPCO. *See Town of Norwood v. New England Power Company*, 202 F.3d 408, 412 (1st Cir. 2000) (*Norwood II*).

[3] *See Town of Norwood v. FERC*, 217 F.3d 24, 25 (2000) (*Norwood IV*).

[4] *Norwood IV*, 217 F.3d at 25-26.

[5] *Id.* at 26.

power sales tariff; (c) sell its non-nuclear generating facilities; (d) release its affiliates from their long- term requirements contracts with NEPCO (on payment of termination charges); and, (d) in general, revise its rates so as to facilitate customer choice and market-based pricing, in accordance with the directives of the public utility commissions in its service areas.[6]

9. As part of this restructuring, NEPCO proposed to temporarily sell wholesale electric energy at non-cost-based rates under an offering called the "standard offer of service." The rates under this offer began at 3.2 cents per kilowatt hour in 1998 and increase to 5.1 cents per kilowatt hour in 2004. NEPCO made this offer to those retailers that the state public utility commissions had required to offer retail standard offer rates to their own customers.[7] Such retailers included NEPCO's affiliates, Mass Electric and Narragansett, but did not include Norwood, which has no obligation to allow competitive access to its customers.[8] Over Norwood's objections, the Commission approved: (a) NEPCO's restructured rates, as well as a freeze on the rates that NEPCO charged wholesale customers such as Norwood;[9] and (b) the divestiture of NEPCO's non-nuclear generation.[10] The Court

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[6] *See Norwood I*, 202 F.3d at 396-97; *Norwood IV*, 217 F.3d at 25-26.

[7] The states were introducing competition at the retail level and wanted retail purchasers to have an initial low-rate offering as a backup while competitive sources of supply developed. See *Norwood II*, 202 F.3d at 413.

[8] *Id.*

[9] *See New England Power Company*, 78 FERC ¶ 61,080 (1997); *New England Power Company*, 81 FERC ¶ 61,281 (1997), *reh'g denied*, 83 FERC ¶ 61,265 (1998); *reh'g denied*, 84 FERC ¶ 61,175 (1998); *New England Power Company*, 82 FERC ¶ 61,179 (1998), *reh'g denied*, 83 FERC ¶ 61,275 (1998).

[10] *New England Power Company, Narragansett Electric Company, AllEnergy Marketing Company, L.L.C., and USGen New England, Inc.*, 82

of Appeals for the First Circuit upheld the Commission's orders.[11]

10. On March 4, 1998, Norwood notified NEPCO that it was terminating service under its service agreement with NEPCO, effective April 1, 1998, and would, on that date, begin taking service from Northeast Utilities Service Company. On March 18, 1998, NEPCO filed an amendment to FERC Tariff No. 1, permitting customers such as Norwood to terminate their contracts early, on only thirty days' notice (compared to seven years' notice), conditioned on the customers paying a contract termination charge (the CTC that is the subject of Norwood's complaint).[12] The CTC was based on an avoided cost concept[13] that is similar to the lost revenues approach that the Commission approved in Order No. 888.[14] Norwood

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FERC ¶ 61,179, *order on clarification and reh'g*, 83 FERC ¶ 61,275 (1998).

[11] *Norwood I*, 202 F.3d at 398-405.

[12] NEPCO offered its Tariff No. 1 customers an open season in which to terminate their service under the tariff. NEPCO stated that the proposed amendment would afford Norwood the ability, which it otherwise did not have, to terminate its service under the tariff on April 1, 1998, conditioned on its paying the CTC. NEPCO emphasized that it stood ready to negotiate termination agreements with its wholesale requirements customers on mutually agreeable terms. *See New England Power Company*, 83 FERC ¶ 61,174 (1998); *New England Power Company*, 83 FERC ¶ 61,265 (1998); *reh'g denied* 84 FERC ¶ 61,175 (1998).

[13] NEPCO calculates the CTC based on the difference between the revenues that NEPCO would have received had the customer continued to take service for the applicable notice period (reduced by the portion of those revenues attributable to transmission costs) and the estimated market value of the power the customer would have received in that circumstance. Norwood estimates that the CTC will exceed seven million dollars per year until 2008. *See New England Power Company*, 83 FERC ¶ 61,174, *reh'g denied*, 84 FERC ¶ 61,175 (1998).

[14] Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No.

has terminated its contract with NEPCO but has not paid the CTC.

11. Norwood brought a breach of contract and antitrust action against NEPCO and others in the U.S. District Court for the District of Massachusetts, alleging that NEPCO had breached the 1983 power purchase contract and that the CTC resulted in anticompetitive effects. The District Court dismissed the action.[15] The court of appeals affirmed the District Court's order, except that it remanded one antitrust claim to the District Court for further proceedings.[16]

12. Norwood also sought a declaratory order from the Commission that its July 25, 1990 letter did not extend the term of its contract with NEPCO to October 31, 2008 (the contract expiration date that NEPCO uses in its calculation of the CTC). The Commission denied Norwood's petition.[17] The court of appeals upheld the Commission's decision, expressly finding that the 1990 letter extended the contract, and thus extended Norwood's obligation to purchase electric energy from NEPCO to October 31, 2008.[18]

888, 61 Fed. Reg. 21,540 (May 10, 1996), FERC Stats. & Regs., Regulations Preambles, January 1991-June 1996 ¶ 31,036 (1996), *order on reh'g*, Order No. 888-A, 62 Fed. Reg., 12,274 (March 4, 1997), FERC Stats. & Regs., Regulations Preambles, July 1996-December 2001 ¶ 31,048 (1997), *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group, et al., v. FERC*, 225 F. 3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 122 S. Ct. 1012 (2002).

[15] *Town of Norwood, Mass. v. New England Power Company*, 23 F. Supp. 2d 109 (D. Mass. 1999).

[16] *Norwood II*, 202 F. 2d at 414-424.

[17] *Town of Norwood, Mass.*, 87 FERC ¶ 61,341 (1999), *reh'g denied*, 88 FERC ¶ 61,187 (1999).

[18] *Norwood IV*, 217 F.3d at 27-30.

The Complaint

13. On December 23, 2002, Norwood filed a complaint against National Grid, et al., attacking the CTC as unjust and unreasonable and unduly discriminatory and preferential or otherwise unlawful under the Federal Power Act (FPA). In support of its complaint, Norwood makes the following claims:

(A) NEPCO charges a CTC to Norwood that is higher than the CTC that it charges to its affiliated distribution systems and thus is unduly discriminatory and preferential and places Norwood in an unlawful price squeeze, in violation of sections 205 and 206 of the FPA.

(B) NEPCO bases the CTC that it charges Norwood on an erroneous calculation of the estimated market value of the load that NEPCO would have had to supply absent early termination of the contract ("the customer's released load").

(C) The revenue factor that NEPCO relies on to calculate the CTC is incorrect.

(D) The rate of return that NEPCO uses in the CTC calculation is excessive.

(E) NEPCO's deduction for transmission revenues misapplies the Order No. 888 formula and results in an overcharge to Norwood.

(F) NEPCO has understated its fixed power supply costs relating to Norwood, resulting in a CTC that is unjust and unreasonable.

(G) NEPCO's use of October 31, 2008 as the earliest date on which Norwood could have unilaterally terminated the contract is incorrect and results in a CTC that is unreasonably high.

(H) The CTC in conjunction with the rates that Norwood pays Northeast Utilities results in discriminatory and unduly

preferential rates in violation of Sections 205 and 206 of the FPA.

(I) NEPCO's denial of standard offer wholesale service ("the standards offer of service," discussed above) to Norwood, while offering it to NEPCO's affiliates, was discriminatory and preferential, in violation of Sections 205 and 206 of the FPA.

(J) NEPCO's charging Norwood a CTC, while not imposing the same charge on its affiliates, constitutes undue discrimination and preferential treatment, in violation of Sections 205 and 206 of the FPA.

(K) NEPCO's failure to offer an open season without a CTC charge as part of its divestiture of non-nuclear generation results in a CTC charge that is not a just and reasonable condition for termination of service.

(L) The CTC violates 18 C.F.R. § 35.26 (2003), which precludes stranded cost recovery in new contracts that do not contain an exit fee or explicit stranded cost provision.

(M) The CTC is unlawful because NEPCO did not provide Norwood with an opportunity to market or broker the capacity that Norwood released when it terminated its contract with NEPCO.

The Answer

14. On January 1, 2003, National Grid filed an answer and motion to dismiss. National Grid claims that Norwood's obligation to pay the CTC is beyond doubt. It also asserts that the Commission and the courts have already decided all of the issues that Norwood raises in its complaint. It asks the Commission to summarily dismiss all of Norwood's claims. In the alternative, it asks the Commission to either: (a) insist that Norwood pay the full amount of its current obligation under the CTC into escrow before it can raise its claims; or (b) refer the matter to a settlement judge for prompt resolution. Finally, National Grid argues that Norwood has

failed to state a claim against National Grid, New England Electric System, Massachusetts Electric or Narragansett.

Norwood's Reply

15. On February 24, 2003, Norwood filed an answer to the National Grid's answer, largely repeating the arguments in its complaint.

Discussion

A. Procedural Matter

16. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2002), prohibits an answer to an answer, unless otherwise permitted by the decisional authority. We are not persuaded to allow Complainant's answer and will, therefore, reject it.

B. The Motion to Dismiss

17. National Grid asks that we dismiss the complaint as to National Grid, New England Electric System, Massachusetts Electric and Narragansett. We find that the motion is premature. NEPCO, New England Electric System, Massachusetts Electric and Narragansett are all affiliates of National Grid and the complaint raises claims against all of these entities. It would be premature to dismiss these entities from the complaint proceeding without further examination of their respective functions and interrelationships and their connection (or not) with the CTC. To eliminate any of these entities at this juncture would potentially unnecessarily restrict the relief that the Commission may, if necessary, be able to fashion.

C. The CTC

18. Claims (B) to (F) of Norwood's complaint relate to the way in which NEPCO calculates the CTC. The Commission has approved the use of a CTC for the early termination of a contract and has accepted NEPCO's CTC formula, but has not accepted the individual components of the CTC

calculation.[19] While the court of appeals upheld the Commission's orders, it noted that Norwood could bring a complaint regarding the way in which NEPCO has calculated the CTC.[20] As the Commission has not approved the individual components used in NEPCO's calculation of Norwood's CTC, the Commission will set these claims (B through F) for hearing. Norwood will, of course, have the burden of proof on each and every element of these claims.

19. National Grid is correct that the Commission and the courts have conclusively adjudicated all of the other claims that Norwood raises in its complaint. For example, claims (A), (H), (I) and (J) charge that the standard offer rates either alone or in combination with the CTC result in rates that are unduly discriminatory and preferential and place Norwood in an unlawful price squeeze, in violation of sections 205 and 206 of the FPA. The court of appeals has held that "the mere disparity in Norwood's contract termination charge vis-a-vis that of other companies is not a per se violation of the undue preference prohibition."[21] It has also found that Norwood was not similarly situated to NEPCO's affiliates because Norwood did not have an obligation under state law to provide standard offer service to its customers, and that this

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[19] In accepting the CTC, the Commission found, among other things, that the proposed formula for calculating the CTC would recover the revenues lost over the existing seven-year notice of the termination term, less an estimate of the market value of the released capacity and energy, and that Norwood would avoid payment of the full demand charges over the remainder of the contract term. *See New England Power Company*, 83 FERC ¶ 61, 174 at 61,723; *reh'g denied*, 84 FERC ¶ 61,175 at 61,919 (1998).

[20] *See New England Power Company*, 83 FERC ¶ 61,174 at 61,7121-24 (1998), *aff'd Norwood I*, 202 F. 2d at 401.

[21] *Norwood I*, 202 F.3d at 402. NEPCO offered to negotiate a similar termination agreement with Norwood. *New England Power Company*, 83 FERC ¶ 61,174, n.13 (1998). Norwood did not accept the offer.

difference justifies the different treatment.[22] The Commission will not, therefore, set these claims for hearing.

20. Claim (G) relates to the earliest date on which Norwood could have unilaterally canceled its contract with NEPCO. Both the Commission and the court of appeals have held that Norwood's June 25, 1990 letter to NEPCO extended its contract to purchase electric energy from NEPCO until October 31, 2008, the date that NEPCO uses in calculating the CTC.[23] Accordingly, the Commission will not set this claim for hearing.

21. Claims K, L and M relate to: (a) NEPCO's failure to offer an open season without a CTC in which to terminate the requirements contract; (b) the possibility that the CTC violates the prohibition against recovery of stranded costs in new contracts that do not contain exit fees or explicit stranded cost provisions; and (c) the absence of an opportunity for Norwood to market or broker the capacity that it released when it terminated its contract with NEPCO. Both the Commission and the court of appeals have found that: (a) the imposition of a CTC when a customer terminates a contract before its expiration date is reasonable;[24] (b) the rules relating to stranded cost recovery do not apply to a charge for premature termination of a contract;[25] and (c) the rules allowing customers to market or broker released capacity do

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[22] *Id.* at 402-023.

[23] *See Town of Norwood*, 87 FERC ¶ 61,341 (1999), *aff'd Norwood IV*. *See also New England Power Company*, 83 FERC ¶ 61,174 at 61,722 & n. 7

[24] *See New England Power Company*, 83 FERC ¶ 61,174 at 61723-24, *reh'g denied*, 84 FERC ¶ 61,175 (1998); *Norwood I*, 202 F3d at 400. The Massachusetts Superior Court found that the CTC is "akin to a *quid pro quo* for terminating the contract early." *New England Power Company v. Town of Norwood*, 2000 WL 292974 at 10.

[25] *New England Power Company*, 83 FERC ¶ 61,174 at 61,273; *reh'g denied* 84 FERC ¶ 61,175 (1998); *Norwood I*, 202 F3d at 398-399.

not apply to premature contract termination.[26] Consequently, the Commission will not set these claims for hearing.

D. Hearing and Settlement Judge Procedures

1. Hearing Procedures

22. In cases where, as here, the Commission institutes an investigation on complaint under Section 206 of the Federal Power Act, Section 206(b) requires that the Commission establish a refund effective date that is no earlier than 60 days after the filing of the complaint, but no later than five months subsequent to the expiration of the 60-day period. Consistent with our general policy of providing maximum protection to customers,[27] we will set the refund effective date as of the date 60 days after the date of the filing of the complaint, or February 21, 2003.

23. Section 206(b) also requires that, if no final decision is rendered by the refund effective date or by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to Section 206, whichever is earlier, the Commission shall state the reasons why it has failed to do so and shall state the best estimate as to when it reasonably expects to make such a decision. Ordinarily, to implement that requirement, we would direct the presiding judge to provide a report to the Commission in advance of the refund effective date. Here, given that the refund effective date for the complaint has passed, the Commission cannot follow its normal procedure.

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[26] *Norwood I*, 202 F.2d at 399 (Commission may allow the recovery of foregone revenues "whenever a customer purports to disregard an existing obligation").

[27] *See e.g., Seminole Electric Cooperative, Inc. v. Florida Power & Light Company*, 65 FERC ¶ 61,413 at 63,139 (1993); *Canal Electric Company*, 46 FERC ¶ 61,153 at 61,539, *reh'g denied*, 47 FERC ¶ 61,275 (1989).

24. Although we do not have the benefit of the presiding judge's report, based on our review of the record, we expect that, assuming the case does not settle, the presiding judge should be able to render a decision within eight months of the commencement of hearing procedures. After the presiding judge renders an initial decision, assuming the case does not settle, we estimate that we will be able to issue our decision within approximately five months of the filing of briefs on and opposing exceptions.

2. Settlement Judge Procedures

25. While we are setting this proceeding for a trial-type, evidentiary hearing, we encourage the parties, before hearing procedures are commenced, to first make every effort to settle their dispute. To aid the parties in their settlement efforts, the hearing we have ordered shall be held in abeyance and a settlement judge shall be appointed to assist the parties in reaching a settlement.[28] If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in this proceeding; otherwise the Chief Judge will select a judge.[29]

The Commission orders:

(A) The motion to dismiss is hereby granted in part and denied in part, as discussed in the body of this order.

(B) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by Section 402(a) of the Department of Energy Organization Act and the Federal Power Act, particularly Section 206 thereof, and pursuant to the Commission's Rules

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[28] 18 C.F.R. § 385.603 (2003).

[29] If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five days of this order. FERC's website contains a listing of Commission judges and a summary of their backgrounds and experience (www.ferc.fed.us - click on the Office of Administrative Law Judges).

of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R. Chapter 1), a public hearing shall be held in Docket Nos. EL03-37-000 into the justness and reasonableness of the calculation of the CTC, as discussed in the body of this order.

(C) Pursuant to Rule 603 of the Commission's Rules of Practice and procedure, 18 C.F.R. § 385.603 (2001), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding within fifteen (15) days of the date of this order. To the extent consistent with this order, the designated settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable.

(D) Within sixty (60) days of the date of this order, the settlement judge shall file a report with the Chief Judge and with the Commission on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every 30 days thereafter, informing the Chief Judge and the Commission of the parties' progress toward settlement.

(E) If settlement discussions fail, a presiding administrative law judge, to be designated by the Chief Administrative Law Judge, shall convene a prehearing conference in this proceeding, to be held within approximately fifteen days of the settlement judge's report to the Commission, in a hearing room of the Federal Energy Regulatory Commission, 888 First Street, N.E. Washington, D.C. 20426. Such conference shall be held for the purpose of establishing a procedural schedule. The presiding administrative law judge is authorized to establish procedural dates, and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

(F) The refund effective date in Docket No. EL03-37-000 established pursuant to Section 206(b) of the Federal Power Act is February 21, 2003.

By the Commission.

[SEAL]

Linda Mitry
Acting Secretary

APPENDIX G

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July 15, 2003

HAND DELIVERY
Ashley Brown Ahearn
Appeals Court of the Commonwealth of Massachusetts
1500 New Court House, Pemberton Square
Boston, MA 02108

Re: *New England Power Company v. Town of Norwood and Norwood Municipal Light Department*
Docket No.: 01-P-1467

Dear Ms. Ahearn:

Normally the Town of Norwood would not reply to New England Power Company's ("NEP") July 9, 2003 correspondence sent to this Court responding to Norwood's July 8, 2003 letter. Norwood's letter to this Court attached the Federal Energy Regulatory Commission's ("FERC") July 2, 2003 Order in Docket No. EL-03-3700. That Order ruled against NEP's Motion to Dismiss.

Norwood took great pains to follow Mass.R.Civ.P. 16(1) and not include argument when it submitted the FERC Order on July 8, 2003. However, Norwood believes that NEP violated this Rule by submitting arguments in its July 9, 2003 response. Thus, given the competitive and monetary significance of the impact of a decision by this Court, and the

fact that the NEP letter of July 9, 2003 raises new arguments and disputed factual issues, Norwood regretfully must respond to certain of NEP's arguments. Kindly provide this letter to Justices Greene, Kafker and Raposa.

NEP attempts incorrectly to minimize the FERC Order by arguing that "the FERC Order permits Norwood to pursue only its challenges to certain values in the tariff formula to calculate the CTC." NEP's argument is misleading and misapplies the FERC Order. That Order unequivocally demonstrates that FERC has not accepted or approved the individual components used in NEP's calculation of the Norwood CTC. NEP's logic is flawed because if the components of the CTC are not correct, then the whole amount of the CTC is incorrect. The fact that FERC never approved the components of the CTC, unilaterally filed by NEP, makes it obvious that the amount of its CTC has no substance or value and that there is no support for NEP's $27 million claim. NEP was attempting to get the Superior Court to force Norwood to pay a $27,000,000 charge as damages based on components to an optional CTC amendment which have never been accepted or approved as just or reasonable by FERC or proper under Massachusetts law. If the Court below had allowed Norwood to provide evidence on damages, Norwood would have shown that Norwood's damages would not have been $27 million but only between $0 and $3.7 million for the period of the suit, and only if Norwood is found to have breached the contract and all of Norwood's claims against NEP are dismissed.[1] Therefore, the FERC

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[1] In addition, a recent FERC decision confirms that FERC is barred from awarding damages for breach of contract.

> . . . It is well-settled that the Federal Power Act does not confer on the Commission the authority to award damages or reparations for breach of contract. See *Gulf States Utilities Co. v. Alabama Power Co.*, 824 F.2d 1465, 1491 (5th Cir. 1987); *New England Power Pool*, 98 FERC ¶61,299 at 62,290 n.6 (2002). See also *Montana-*

Order provides justification on grounds of economy, efficiency and principles of justice for this Court to remand this case back to the Superior Court for a trial.

NEP's reliance on the filed rate doctrine under *Arkansas Louisiana Gas Co. v. Hall* ("*Arkla*") is misplaced. Where the FERC has never "accepted" or "approved" a specific rate, the "filed rate doctrine" does not apply. NEP's contention—that the components of the CTC which were never approved by FERC are binding on Norwood prior to February 21, 2003, based on the "filed rate doctrine" and *Arkla*—is without merit. This theory also was never addressed by the Court below and the fact that FERC never accepted or approved the components of the CTC makes it obvious that the CTC has no value. If the components have no value before February 21, 2003, the sum of the components has no value. *Arkla* correctly applied supports Norwood's position. *See* Norwood Brief at pp. 19-22.

In its letter, NEP tries to make much of the retroactive or prospective nature of the Section 206 Order by FERC. NEP's attempt to confuse the issue with this Section 206 argument is specious. The issue of whether a Section 206 FERC Order is retroactive or prospective is *irrelevant* to a Superior Court decision on damages because the Court must apply the correct decision on the amount of damages, if any, based on state law from the time of the filing of the NEP Complaint. This is especially the case since NEP brought this case to a Massachusetts Court as a breach of contract action. The Superior Court incorrectly relied on components presented to the Court which had never been accepted or approved by

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Dakota Utilities Co. v. Northwestern Public Services Co., 341 U.S. 246, 257-58 (1951) (Frankfurter J. dissenting). . . .

Consolidated Edison Co. v. Public Service Electric and Gas Company, 103 FERC ¶63,067 (June 11, 2003) at 13 (ALJ Benkin).

FERC. The Superior Court made no independent investigation of damages. These are additional reasons why this case should be dismissed or remanded for a trial.

Thank you for your consideration.

Very truly yours,
/s/ Alan K. Posner
ALAN K. POSNER

AKP/s1
cc: Michael Angelini, Esq. (via facsimile)

APPENDIX H

[LOGO]
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July 9, 2003

Via Federal Express

Ashley Brown Ahearn, Clerk
Appeals Court of the Commonwealth of Massachusetts
1500 New Court House, Pemberton Square
Boston, MA 02108

Re: New England Power Company v. Town of Norwood and Norwood Municipal Light Department Docket No.: 01-P-1467

Dear Ms. Ahearn:

New England Power Company ("NEP") requests that this response to Norwood's letter of July 8, 2003, regarding the July 2, 2003 decision (the "FERC Order") of the Federal Energy Regulatory Commission ("FERC") be provided to the panel considering this appeal.

As NEP pointed out in its Brief as Appellee, Norwood has always had the right to challenge the CTC on a going forward basis (NEP Brief at 31) and the FERC Order simply establishes the procedures for such a prospective challenge. It neither requires nor supports reversal of the Superior Court Judgment.

The FERC Order permits Norwood to pursue only its challenges to certain values in the tariff formula used to calculate the CTC. FERC rejected Norwood's challenge to the formula itself and its numerous challenges to NEP's right to collect CTCs from Norwood. Thus, the FERC Order confirmed NEP's right to collect CTCs from Norwood in accordance with its approved wholesale tariff; the only issues that FERC permitted Norwood to pursue concern limited aspects of the calculation of the CTC and, as explained below, only with respect to CTCs payable *after* February 21, 2003.

Under the express terms of Section 206 of the Federal Power Act, 16 USC § 824e, the only relief that FERC can grant is prospective. If Norwood meets its burden of proof, FERC must "determine the just and reasonable rate . . . *to be thereafter observed* and in force". 16 USC § 824e(a). (Emphasis added.) The statute requires FERC to establish a "refund effective date," no earlier than 60 days after a complaint is filed, and authorizes FERC, if it concludes that the challenged rate is excessive, to direct the payment of "refunds of any amounts paid, for the period *subsequent to the refund effective date* . . . " 16 USC § 824e(b). (Emphasis added.) In this case, FERC established the "refund effective date 60 days after the date of the filing of the complaint, or February 21, 2003" in furtherance of FERC's policy of "providing maximum protection to customers." FERC Order, p. 10. The statute and the FERC Order are clear: even if Norwood prevails on any of its challenges to the CTC calculation, there would be no changes to CTCs charged prior to February 21, 2003. In other words, FERC can do no more; prospective relief is the *only* relief it can grant to Norwood under Section 206.

As a result, any change to the appropriate CTC formula will apply only to rates charged *after* February 21, 2003. Prior to that time, the current CTC rate is the only rate on file

with FERC. "Not only do the courts lack authority to impose a different rate than the one approved by the Commission, but the Commission itself has no power to alter a rate retroactively. When the Commission finds a rate unreasonable, it 'shall determine the just and reasonable rate . . . to be *thereafter* observed and in force.' [Citations omitted.] This rule bars 'the Commission's retroactive substitution of an unreasonably high or low rate with a just and reasonable rate.'" *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 578 (1981). (Citations omitted; emphasis in original.)[1]

Thus, the FERC Order does not support reversal of the judgment under appeal. NEP's Complaint sought a judgment for the CTC accumulated to date, and the judgment that Norwood appeals from is only for the CTC accumulated to January 31, 2001. Record Appendix 1174. Thus any prospective relief FERC may grant would have no effect on the judgment in this case, which is retrospective only.

Norwood could have challenged the formula as part of FERC's approval of the CTC tariff amendment under Section 205(d) of the Federal Power Act, 16 USC § 824d(d), when NEP filed the CTC in 1998. But Norwood chose not to do so. *Norwood v. FERC*, 202 F.3rd 392, 401 (1st Cir. 2000). ("If these charges were miscomputed or unsupported, Norwood might well have a legitimate objection; but it has not explained any such objection to us, let alone tried to support it with citations or figures.") Norwood also had the alternative right, from the inception of the CTC, to challenge its CTC, calculated pursuant to the approved tariff formula, under Section 206. Indeed, FERC virtually invited it to do so.

---

[1] While *Arkansas Louisiana* involved the Natural Gas Act, rather than the Federal Power Act, "the relevant provisions of the two statutes 'are in all material respects substantially identical'" and the Supreme Court has an "established practice of citing interchangeably decisions interpreting the pertinent sections of the two statutes." *Arkansas Louisiana, 453 U.S. at 577 n. 7.*

Norwood v. New England Power Company, 202 F.3rd 408, 419 (1st Cir. 2000). However, Norwood waited until 2002 to challenge the CTC formula prospectively, instead of doing so in 1998, when *all* of its charges were prospective. Norwood may not simply ignore its own tactical decisions not to do so, and may not convert its potential prospective remedy into a retrospective challenge to the CTC. Doing so would contravene the FERC's approval of the CTC in 1998, three First Circuit affirmances of Norwood's innumerable challenges to the CTC, and the undisputed facts showing that Norwood is in breach of its contract with NEP.

Finally, Norwood neglects to mention that FERC also rejected, on res judicata grounds, all of Norwood's challenges to NEP's right to collect the CTC *vel non*, several of which duplicated the essentially identical counterclaims that Norwood has filed against NEP in the Superior Court, under different clothing; *i.e.*, that the CTC rate discriminates against Norwood and in favor of NEP's affiliates (Counterclaim VI, ¶¶ 52-55), and that the Power Contract did not extend beyond October 31, 1998 (Count VI, ¶¶ 56-60). Order, pp. 6-7, ¶¶ (A), (G), (H), (I), and (J).

In short, nothing in the FERC Order warrants a conclusion other than the affirmance of the Superior Court and the dismissal of Norwood's appeal.

Very truly yours,
/s/ Michael P. Angelini
MICHAEL P. ANGELINI

MPA/rs
cc: Alan K. Posner, Esquire—(via facsimile and Federal Express)

APPENDIX I

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July 8, 2003

BY HAND DELIVERY
Massachusetts Appeals Court
Clerk's Office
1500 New Courthouse
Pemberton Square
Boston, MA 02108

RE: New England Power Company v. Town of Norwood Appeals Court No. 01-P-1467

Dear Sir or Madam:

This firm represents the Town of Norwood in the above matter which is under advisement at the Massachusetts Appeals Court. Pursuant to Mass. R. App. P. 16(1), I write to bring to the Court's attention a recent decision by the Federal Energy Regulatory Commission ("FERC") which supports Norwood's position in this case, particularly as to the issue of damages. Kindly provide this letter to Justices Greene, Kafker and Raposa. We have provided seven (7) copies of this letter and the recent FERC decision for the Justices' consideration.

The Town of Norwood filed a Section 206 Complaint at the FERC against the New England Power Company ("NEP") and its affiliates in Docket No. EL03-37-000, asking FERC to calculate the proper level of the CTC, if Norwood

ever elected the optional termination charge (CTC) and it became part of Norwood's Power Contract with NEP. The FERC in an Order issued July 2, 2003, denied NEP's motion to dismiss the Complaint. The FERC held that it "has not accepted the individual components of the CTC calculation":

> . . . As the Commission has not approved the individual components used on NEPCO's calculation of Norwood's CTC, the Commission will set these claims (B through F) for hearing.

FERC Order ¶ 18. FERC also concluded that "[t]his order benefits customers by ensuring that the CTC is calculated correctly." FERC Order at ¶ 1.

That FERC hearing will address: whether the CTC is based on an erroneous calculation of the estimated market value of the load that NEP would have had to supply absent early termination of the Contract; the appropriateness of the revenue factor that NEP relies on to calculate the CTC; the appropriateness of the rate of return that NEP uses in the CTC calculation; whether NEP's deduction for transmission revenue misapplies the Order No. 888 formula and results in an overcharge to Norwood; and whether NEP has understated its fixed power supply costs relating to Norwood, thereby resulting in a CTC that is unjust and unreasonable. FERC Order at ¶ 13.

In the case now pending before this Court, the Superior Court below ruled that Norwood had breached the Power Contract solely by not paying the CTC, and adopted the specified payments of $615,674 per month of the CTC (optional termination charge) that NEP filed at FERC as the basis for its judgment. As now confirmed by FERC, that judgment has never been reviewed as to accuracy or reasonableness by FERC or the Superior Court. No trial on liability or damages was ever held by the Court below.

As such, the FERC's Order of July 2, 2003 demonstrates that disputed issues of material fact exist, which preclude the Superior Court's summary judgment. This supplemental citation provides justification on grounds of economy, efficiency and principles of justice for this Court to remand this case back to the Superior Court for a trial. *See* Norwood's letter to this Court of March 10, 2003.

Thank you for your consideration.

Very truly yours,
/s/ Alan K. Posner
ALAN K. POSNER

AKP/s1
Enclosure
cc: Michael Angelini, Esq.

APPENDIX J

FEDERAL ENERGY REGULATORY COMMISSION

Docket Nos. EL03-37-000, EL03-37-001

TOWN OF NORWOOD, MASSACHUSETTS

v.

NATIONAL GRID USA
NEW ENGLAND ELECTRIC SYSTEM
MASSACHUSETTS ELECTRIC COMPANY AND NARRAGANSETT ELECTRIC LIGHT COMPANY

EXHIBIT S-1,
WENDELIN W. WHITFIELD DEPOSITION TESTIMONY
(EXCERPTS—PAGES 11-12 & 22)

(Taken Feb. 10, 2004)

[11]Q. WHAT DO YOU INFER FROM THIS?

A. The CTC formula is somewhat modeled on the Commission's stranded cost formula as set out in Order 888, and it seems to me that recognition should be made in the formula for the particular circumstances underlying the events in this proceeding. I note that the Commission's stranded cost calculation is designed to allow a departing customer to assess the probable costs associated with its departure, and in fact, the Commission requires that a stranded cost estimate with workpapers be provided to the customer, so that a decision whether to stay or go with all of the relevant facts. Here, Norwood made the decision to leave, and in fact both entered into a replacement contract with Northeast Utilities and gave NEPCO notice of its desire to leave before NEPCO formulated the CTC formula or received Commission approval to levy a contract termination charge on Norwood. (See Exhibit S-2, pages .) On the other hand, using the

stranded cost procedures as a guide, since NEPCO did not provide its CTC estimate and the supporting data before Norwood left, perhaps the CTC should be eliminated.

Second, both Norwood and NEPCO were aware of the fact that NEPCO was in the process of shedding a significant portion of its generation, even though, as NEPCO points out in its testimony, it had not yet finally succeeded in doing so. Nevertheless, it was no great secret, particularly since the order to do so had come [12] from the Massachusetts State Commission, and it was not something NEPCO decided to do only after Norwood had given notice. Moreover, NEPCO's calculation does not give recognition of the fact that it was successful in divesting itself of this generation, and in fact received a premium over net book value when it consummated the transaction, which it did reflect in CTC's for other customers. (Exhibit S-2, pages .)

Third, the Commission has not approved any particular methodology as the standard way of calculating a CTC as it has for stranded costs. As I stated earlier, while the Commission may have approved the general idea of a CTC for Norwood, it has not approved this particular CTC, nor has it accepted or approved any of the assumptions underlying the stranded cost calculation as the basis for any of the elements of the CTC formula, except perhaps the use of the contract termination date of October, 2008 to determine what in the stranded cost calculation would be the "reasonable expectation period." For example, while under the stranded cost formula a "snapshot" approach is used, that does not automatically mean such a "snapshot" approach for developing elements of the CTC formula is appropriate here.

* * * *

[22] Q. WHAT IS THE CTC FIXED COST DAMAGE THAT YOU CALCULATE FOR NORWOOD?

A. I have calculated a total damage cap of $9,028,554. (See Exhibit S-2, Schedule 4.)

(2)

Supreme Court, U.S.
FILED
APR 27 2004
OFFICE OF THE CLERK

No. 03-1370

IN THE
SUPREME COURT OF THE UNITED STATES

TOWN OF NORWOOD AND THE
NORWOOD MUNICIPAL LIGHT DEPARTMENT,
Petitioners,

v.

NEW ENGLAND POWER COMPANY,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COMMONWEALTH OF MASSACHUSETTS APPEALS COURT

BRIEF IN OPPOSITION

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Counsel for Respondent

QUESTION PRESENTED

An electric power supplier filed a tariff amendment with the Federal Energy Regulatory Commission, setting forth a formula for calculating a termination charge to be imposed on customers seeking to terminate their long-term power supply contracts early.

The question presented is whether the utility may enforce the charge against the customer without obtaining the Commission's approval of its calculation of how the formula described in the tariff applies to that customer.

RULE 29.6 STATEMENT

New England Power Company is a wholly owned subsidiary of National Grid USA, which is a wholly owned indirect subsidiary of National Grid Transco plc, a United Kingdom-based company which has issued common stock to the public.

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STATEMENT OF THE CASE

This is a dispute over the charge that petitioner, the Town of Norwood, Massachusetts ("Norwood"), must pay for early termination of its long-term power purchase contract with respondent New England Power Company ("NEP"). The contract obligated Norwood to purchase its power requirements from NEP until at least October 31, 2008, and required it to give seven years' advance notice of termination. The contract also required Norwood to purchase power under NEP's tariff "as [it] may be amended from time to time." The Federal Energy Regulatory Commission approved a tariff filing by NEP, giving customers with such contracts the ability to terminate service early upon payment of a "contract termination charge" ("CTC"). This was part of an overall restructuring of the market to enable customers to seek competitive suppliers. *Town of Norwood, Mass. v. FERC*, 202 F.3d 392, 396-97 (1st Cir.), *cert. denied*, 531 U.S. 818 (2000) (*Norwood I*).

The CTC was based on a formula measuring "the difference between the revenues that NEPCO would have received had the customer continued to take service for the applicable notice period (reduced by the portion of those revenues attributable to transmission costs) and the estimated market value of the power the customer would have received in that circumstance." Pet. App. 47a. The recovery provided by the tariff "is closely akin to contract damages." *Norwood I*, 202 F.3d at 400.

On March 4, 1998, Norwood unilaterally notified NEP that it was terminating its contract early, effective April 1, 1998, and switching to another supplier. Norwood took the position that it was justified in repudiating the contract, because certain other actions NEP had taken in connection

with market restructuring constituted a breach of contract (an issue Norwood was then litigating in federal district court). Subsequently, the district court dismissed Norwood's breach of contract claim, and the First Circuit affirmed. *Town of Norwood, Mass. v. New England Power Co.*, 202 F.3d 408, 416-7 (1st Cir.), *cert. denied*, 531 U.S. 818 (2000) (*Norwood II*)

After Norwood sent its termination letter, but before it became effective, NEP filed a tariff allowing customers to terminate early, contingent on paying the CTC. (Previously, there had been no mechanism to terminate early.) FERC approved the filing over Norwood's protest. *New England Power Co.*, 83 FERC ¶ 61,174 (1998). Norwood filed a petition for review with the First Circuit, which upheld FERC's order. *Norwood I.* The First Circuit rejected various challenges Norwood made to the CTC, including the contention that it discriminated in favor of NEP's affiliated wholesale customers.[1] The First Circuit also rejected Norwood's challenge based on "alleged problems with the contract termination charge calculation." *Id.* at 401. The First Circuit agreed with FERC that Norwood had not identified "a disputed issue regarding the termination charge calculation that necessitated a hearing." *Id.*

The First Circuit noted that FERC's initial order, issued May 15, 1998, had invited Norwood to file a complaint under section 206 of the Federal Power Act

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[1] The First Circuit noted that Norwood was offered the same settlement made available to NEP's affiliates, but instead chose to litigate. *Norwood I*, 202 F.3d at 401-2. The First Circuit concluded that "at least where a party has been offered the same settlement and refused it, a claim based simply on an abstract right to be treated the same as settling companies has much less force -- and to recognize it would subvert the public interest in promoting settlements." *Id.* at 402.

("Act"), 16 U.S.C. § 824e, if it wished to challenge the termination charge calculation. *Id.* The First Circuit -- nearly two years later -- commented that "presumably it can still do so." *Id.*

However, instead of proceeding under section 206 (which offers only prospective relief), Norwood sought a declaratory ruling from FERC that its contract with NEP expired October 31, 1998, its original expiration date. Had this challenge succeeded, it might have limited Norwood's termination charge liability to a period of seven months (April 1 – October 31, 1998). However, FERC ruled that Norwood itself had extended the contract to October 31, 2008, and the First Circuit denied review. *Town of Norwood, Mass. v. FERC*, 217 F.3d 24, 27 (1st Cir. 2000), *cert. denied*, 532 U.S. 993 (2001) (*Norwood III*).

In the meantime, NEP had filed this suit in the Massachusetts Superior Court alleging that Norwood's failure to pay the CTC was a breach of its contract obligation to pay the charges due under NEP's tariff "as [it] may be amended from time to time." Pet. App. 11a. The complaint alleged that, as of the date the suit was filed (December, 1998), the accumulated charge was $4.5 million. Norwood made a variety of contentions in defense of the suit. However, the only additional challenge Norwood made to NEP's calculation under the CTC formula was to contend that NEP had used the wrong interest rate. Over two years later, when the Superior Court issued its decision holding Norwood liable for breach of contract, Pet. App. 9a-33a, Norwood still had not challenged NEP's calculation under the CTC formula (other than its interest rate contention) in the Superior Court. Nor had it filed any proceeding with FERC to challenge NEPCO's calculation, following the failure of its challenge to the October 31, 2008 contract expiration date.

In its decision granting summary judgment against Norwood on liability, the Superior Court noted that "Norwood has only argued that the CTC should be rejected *in toto*, and has not put forward any disputed facts as to the calculation of the charge." Pet. App. 32a n.15. Norwood responded with a motion to set the case for trial on the issue of damages, but the only issue it raised as to calculation of the CTC was the correct interest rate.[2] In its decision assessing damages for the CTC calculated through January 31, 2003, the Superior Court held that there was no "genuine issue of material fact as to the amount of damages," which it viewed as a "computational exercise" based on the monthly fee NEPCO had calculated. Pet. App. 8a.

In its brief before the Massachusetts Appeals Court, Norwood again did not raise any computational issue other than interest rate; instead, it argued that the trial court was required to hold a trial on issues outside the scope of the CTC.[3]

In December, 2002 -- over four years after FERC first suggested that it do so[4] -- Norwood finally filed a

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[2] Supplemental Appendix ("Supp. App.") at 1sa-7sa. In its brief on the motion, under the heading "NEP's Calculation of the Amount of the CTC Filed at FERC is Incorrect," the only issue Norwood raised pertinent to whether NEP had calculated the CTC correctly was the interest rate. *Id.* at 4sa-5sa, 8sa-9sa.

[3] In its appellate brief, Norwood argued that a trial on damages was required because 1) NEP failed to prove mitigation of damages, and "the CTC charge never took such mitigation into effect as is required under Massachusetts law"; 2) NEP did not sustain its burden of proving damages, and had none because Norwood paid for all power received under the contract and NEP had no reliance damage; and 3) NEP used the wrong interest rate. *Id.* at 10sa-13sa.

[4] *New England Power Co.*, 83 FERC ¶ 61,174, at 61,724 (1998).

petition with FERC under section 206 of the Federal Power Act. On July 2, 2003, FERC issued a ruling dismissing those portions of the petition which sought to re-litigate issues previously ruled on by FERC and the First Circuit, but setting for hearing five issues on the ground that, while the Commission had previously "accepted NEPCO's CTC formula," it "has not approved the way in which NEPCO has calculated the CTC" payable by Norwood under the formula. Pet. App. 51a, 52a.

The Commission's order established a "refund effective date" of February 21, 2003. Pet. App. 57a. Under section 206(b) of the Act, the Commission's jurisdiction to order refunds is limited to amounts paid for a "period subsequent to the refund effective date." 16 U.S.C. § 824e.

Norwood's attorney then wrote to the Massachusetts Appeals Court, arguing that "[t]he fact that FERC never approved the components of the CTC, unilaterally filed by NEP, makes it obvious that the amount of its CTC has no substance or value and that there is no support for NEP's $27 million claim." Pet. App. 59a.

The Appeals Court then affirmed the trial court's judgment. Pet. App. 1a-6a. It held the FERC Order was irrelevant, because "any relief granted [by FERC] will apply to rates charged after February 21, 2003," while NEP's complaint "seeks CTC charges accumulated through January 31, 2001." Pet. App. 5a n.6.

ARGUMENT

1. The CTC set forth in NEP's tariff filing was a formula, specifying how the contract termination charge would be calculated in the event a customer chose to

terminate its contract early. The Commission found NEP's filing to be "reasonable"[5] and so "accepted NEPCO's CTC formula." Pet. App. 51a. Under settled law, which this Court confirmed just last Term, that is a sufficient basis for the utility to charge rates in accordance with the formula, even if the Commission has not approved the utility's calculation of how the formula applies to particular customers. *Entergy Louisiana v. Louisiana Pub. Serv. Comm'n*, 123 S.Ct. 2050 (2003). The customer may challenge the utility's calculation, but the utility may properly seek enforcement of the charge without filing its calculation with FERC and obtaining FERC approval. In challenging the utility's ability to charge customers on the basis of a FERC-approved formula, the petition presents no novel issue, but instead seeks to revisit a recently decided question.

In *Entergy Louisiana v. Louisiana Pub. Serv. Comm'n*, this Court held that utilities' exercise of discretion within the parameters of the FERC-approved formula pre-empted any effort by state regulatory authorities to second-guess the utilities' formula calculation -- even where FERC had not reviewed or approved the calculation. In that case, allocation of certain system-wide costs to individual state utilities depended in part on classification of "ERS units." The FERC-filed tariff allowed an operating committee of utility representatives to classify the ERS units. The Court rejected a state commission's contention that it could review the prudence of the utilities' classification of these units and their resulting calculation of costs, where FERC had not reviewed and approved the utilities' action. As the Court explained: "It matters not whether FERC has spoken to the precise classification of ERS units, *but only whether the*

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[5] *New England Power Co.*, 83 FERC at 61,723.

FERC tariff dictates how and by whom that classification should be made. The amended system agreement clearly does so, and therefore the [State Commission's] second-guessing of the classification of ERS units is pre-empted." *Entergy*, 123 S.Ct. at 2057 (emphasis added).

That holding is in accord with previous rulings of the District of Columbia Circuit: "When the Commission accepts a formula rate as a filed rate, it grants waiver of the filing and notice requirements of section 205 of the Federal Power Act. . . . [The utility's] rates, then, can change repeatedly, without notice to the Commission, *provided* those changes are consistent with the formula." *Alabama Power Co. v. FERC*, 993 F.2d 1557, 1567-68 (D.C. Cir. 1993) (quoting *San Diego Gas & Elec. Co. v. Alamito Co.*, 46 FERC ¶ 61,363, at 62,129-130 (1989)) (emphasis in original).

Norwood's position would require the Commission to approve not only the rate formula, but every particular application of the formula. But "[i]t can hardly be doubted at this late date that the Commission 'need not confine rates to specific, absolute numbers but may approve a tariff containing a rate 'formula' or a rate 'rule.'"" *Pub. Utils. Comm'n of California v. FERC*, 254 F.3d 250, 254 (D.C. Cir. 2001) (quoting *Transwestern Pipeline Co. v. FERC*, 897 F.2d 570, 578 (D.C. Cir. 1990)). "[B]ecause 'the formula itself is the rate, not the particular components of the formula, . . . periodic adjustments made in accordance with the Commission-approved formula do not constitute changes in the rate itself and accordingly do not require [§] 205 filings.'" *Id.*, 254 F.3d at 254, *Ocean State Power II*, 69 FERC ¶ 61,146, at 61,544-45 (1994). Norwood has cited no authority for the proposition that FERC must approve both the formula and every calculation made under it. Indeed, "[t]he Commission has been accepting formula rates since the early 1970s." *Pub. Utils. Comm'n of California v.*

FERC, 254 F.3d at 254 (citing *Maine Yankee Atomic Power Co.*, 42 FERC ¶ 61,307, at 61,923 (1988)).

With the exception of *Entergy*, which is contrary to Norwood's position, none of the cases Norwood cites involved formula rates. In the case on which Norwood principally relies, a gas producer utility filed with FERC a contract specifying a fixed rate, which FERC approved. The contract also contained a "most-favored-nations" clause committing the purchaser to pay a higher rate if it bought gas from any other seller at a higher rate. *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981) (*Arkla*). Unlike a formula rate, however, the higher rate would not go into effect automatically. Instead, it was conceded that the producer would have to amend its filing to specify the higher price but did not do so because the purchaser failed to tell it of the higher-price purchases. A state court held that the purchaser thereby breached the contract. The Supreme Court reversed, because in order to compute damages the state court had to speculate that the Commission would have found the higher rate just and reasonable if the purchaser had informed the utility and the utility had filed the higher rate. The Supreme Court concluded that "the Commission alone is empowered to make that judgment, and until it has done so, no rate other than the one on file may be charged." *Arkla*, 453 U.S. at 580-81.

Under a formula rate, however, "[t]he filed rate is the formula," and no further FERC ruling is required to implement charges calculated in conformance with it. *Blue Ridge Power Agency v. Appalachian Power Co.*, 58 FERC ¶ 61,193, at 61,598 (1992). Unlike the state court in *Arkla*, the courts below did not determine whether a rate approved by FERC is just and reasonable; they simply enforced the formula rate that FERC had approved, i.e., the CTC formula

in NEP's tariff. That is totally consistent with the filed rate doctrine.[6]

2. Norwood refers to the proceeding it belatedly filed with FERC under section 206 of the Act, challenging the CTC. It refers to the statement FERC made in that proceeding that it had not accepted NEP's calculations under the CTC formula. Pet. 9, Pet. App. 51a-52a. However, as pointed out previously, Norwood concedes that the CTC formula was accepted as part of the filed rate; the degree of "any affirmative approval or scrutiny by the agency" is irrelevant. *Norwood II,* 202 F.3d at 419. Likewise, whether or not FERC also accepted as part of the rate schedule NEP's application of the formula to calculate Norwood's CTC does not affect the applicability of the filed rate doctrine. *Entergy Louisiana v. Louisiana Pub. Serv. Comm'n*, 123 S.Ct. at 2057.

Norwood also cites prefiled staff testimony in the section 206 proceeding opining that the CTC should not exceed $9 million, rather than $78 million that the current CTC will reach if it runs through October, 2008. Pet. 12. The testimony excerpt quoted makes it apparent that the staff person arrived at the $9 million figure by considering factors not contained in the CTC formula that the Commission approved -- not by recalculating the appropriate charge under the formula. Pet. App. 69a-70a. The impropriety of relying on testimony in another (as yet uncompleted) proceeding is

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[6] *Montana-Dakota Utils. Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246 (1951), is inapposite for the same reason. The relief sought in the district court in that case would have required the court to determine what rates were just and reasonable, a task within the exclusive jurisdiction of the Commission. 341 U.S. at 51-52. Here, by contrast, the trial court was merely asked to enforce the FERC-approved rate, not to determine whether that rate was just and reasonable.

underscored by the fact that the same witness has "corrected" her testimony and now opines that the "CTC cap" for Norwood should be $25.4 million, not $9 million. Supp. App. 14sa-17sa. The revised testimony, however, continues to rely on factors not contained in the current Commission-approved CTC formula.

In any event, whether or not the Commission adopts this staff person's views, the Commission's jurisdiction under section 206 is limited to determining, if it decides the present CTC is unjust and unreasonable, "the just and reasonable rate . . . to be *thereafter* observed." 16 U.S.C. §824e(b) (emphasis added); *Federal Power Comm'n v. Sierra Pacific Power Co.*, 350 U.S. 348, 353 (1956). After Norwood filed its complaint under section 206, the Commission established a refund effective date of February 21, 2003, which was the earliest date permissible under section 206(b) (the refund effective date must be not earlier than 60 days after the complaint is filed). Pet. App. 57a. The Act restricts refunds to "the period subsequent to the refund effective date." 16 U.S.C. § 824e(b).[7] The judgment below is restricted to the CTC as accrued through January 31, 2001. Pet. App. 8a. The courts below were plainly correct in concluding that, under these facts, the section 206 proceeding could not affect this case.

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[7] Had Norwood filed its section 206 petition in May, 1998, when the Commission first suggested it do so, Norwood could have received a refund effective date in July, 1998, only four months after the CTC started to accrue -- at a time when the accrued charge would have been less than one-third what the Commission staff witness quoted by Norwood apparently thought the charge should be even before correcting her testimony.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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SUPPLEMENTAL

APPENDICES

SUPPLEMENTAL APPENDIX A

COMMONWEALTH OF MASSACHUSETTS

SUPERIOR COURT

CIVIL ACTION NO. 98-2650A

NEW ENGLAND POWER COMPANY

v.

TOWN OF NORWOOD

EMERGENCY MOTION BY DEFENDANTS TOWN OF NORWOOD AND NORWOOD MUNICIPAL LIGHT PLANT FOR TRIAL ON ISSUE OF DAMAGES

As counsel for Norwood indicated at the February 26th hearing, the defendants, Town of Norwood, Massachusetts and Norwood Municipal Light Department ("NMLD"), respectfully request that this Court order a trial on the issue of damages in this case. The Court previously ruled that it has jurisdiction over New England Power Company's ("NEP") complaint and, in its decision of February 15, 2001, ruled that Norwood has breached its Power Contract with NEP dated April 11, 1983, under state law. While Norwood contests that decision and intends to appeal, even if such a breach occurred, NMLD is still entitled to a trial on damages and to discovery relating thereto.

The Court stated that its decision was based on rulings by the First Circuit Court of Appeals. The First Circuit ruled that FERC had not decided any contract matters and had left such matters up to the courts. *Town of Norwood, Mass. v. New England Power Co.*, 202 F.3d 408, 416 (1st Cir. 2000)(*Norwood II*); *Town of Norwood v. FERC*, 202 F.3d 392, 400 (1st Cir. 2000).

Since the issue of whether the Power Contract had been breached by Norwood was clearly left to the jurisdiction of the courts, of necessity, that jurisdiction also includes the determination of contract damages relating thereto.

Even if NEP's CTC were somehow considered to be relevant to the determination of breach of contract damages by the court, it would at most only be a factor which the jury or court should consider in determining the damages. NEP's actions, even if not egregious enough to constitute a breach by NEP, certainly must be considered in any calculation of damages for a breach of contract by Norwood for non-payment. The major issues that must be resolved for the determination of contract damages include the following.[1]

1. **NEP had a duty to mitigate damages.**

Under contract law, damages should be reduced by any amount which could have reasonably been mitigated by the party seeking relief. Any extra power that NEP was no longer required to deliver to Norwood, placed a mitigation burden on NEP to seek to resell that power to

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[1] See affidavit of Malcolm McDonald attached hereto as Appendix A.

other entities. Norwood will establish that NEP has not suffered any damages because it has, in fact, resold the power to other parties. Also, NEP's filing of the CTC at a level twice as high as that NEP sought to charge its affiliates clearly violated its obligation to mitigate damages.

Plaintiff was under an obligation to mitigate damages, and cannot recover damages flowing from consequences which that party could reasonably have avoided. *See Hall v. Paine,* 224 Mass. 62, 65 (1916); *Degener v. Gray Lines,* 331 Mass. 133 (1954); *Anthony's Pier Four v. HBC Assoc.,* 411 Mass. 451, 455 (1991). As a rule, it is for the jury to determine whether the plaintiff could have lessened the injury it claims by the exercise of ordinary care and at reasonable expense. *See Degener v. Gray Lines*, 331 Mass. at 133-34; *Belkus v. City of Brockton,* 282 Mass. 285, 288 (1933).

2. <u>The CTC as structured precludes Norwood from being able to compete with NEP's affiliates</u>.

Norwood will show that the CTC filed against Norwood was over twice as high as the CTC that NEP filed for a voluntary agreement by its own distribution affiliates. This imposed on Norwood higher costs for its wholesale supply of power and on information and belief to preclude Norwood from competing on an equal playing field with NEP's affiliate distribution companies for retaining existing customers or attracting new customers. This anticompetitive attempt to damage Norwood as a competitor, is an improper basis for an award of damages.

3. NEP's calculation of the alleged amount claimed to be now owed is incorrect.

NEP's claim in its Supplemental Brief in "Support of Motion to Require Town of Norwood to Post Bond" dated February 23, 2001, that the Town of Norwood "now owes NEP for $27,149,054.08 as of January 31, 2001" is incorrect. The affidavit by Roger W. Pageau (as well as his previous affidavit of July 20, 2000) are based on calculations using an 18% interest rate (NEP Supp. Br. at 1, and fn 1 and 2). The applicable interest rate is not 18%. NEP's contract termination charge filed at the FERC specifies the following:

> ...the Customer's payments shall include carrying charges at the unpaid amount of the Contract Demand Charge at the interest rate determined pursuant to §35.19a of the Commission's regulation (18 C.F.R. §35.19a) effective on the Early Termination Date and compounded monthly.

The Commission's regulations at 18 C.F.R. §35.19a describe the following interest rate:

> (a)(2)(iii)(A)...the applicable average prime rate for each calendar quarter shall be the arithmetic mean to the nearest one-hundredth of one percent, of the prime rate values published in the *Federal Reserve Bulletin*, or in the Federal Reserve's "Selected Interest Rates" (Statistical Release G.13) for the fourth, third and second months, preceding the first month of the calendar quarter.
>
> (B) The interest required to be paid under

clause (iii)(A) shall be compounded quarterly.

4. **NEP has wrongfully sought to increase damages by retaining its rights to high cost nuclear power only applicable to Norwood.**

Norwood will establish that NEP, in the sale of its high cost nuclear entitlements, specifically designed a provision to retain costs to apply against Norwood, which would increase any damage calculation. Norwood will establish that this conduct was wrongful and, thus, should be disallowed as damages.

5. **NEP's damages should be limited to the profit that it would have received over and above its actual cost of serving Norwood.**

Since Norwood was committed under the contract to pay only for NEP's cost to serve plus a rate of return, the damages for breach of the contract would be limited to this amount. NEP's filed CTC far exceeds any lost profits from the contract.

6. **NEP is not entitled to collect more than its actual cost of service.**

This Court has ruled that the contract is based on Tariff No. 1 "which required that the rates would be based on NEP's actual cost of generating the electric power plus the actual costs in NEP's purchase power contract in addition to a regulated rate of return." Decision at 3. Since NEP has voluntarily sold all of its non-nuclear generating and purchase power contracts, it no longer has these costs as a

basis for its Tariff No. 1 service under the existing power contract. Norwood seeks to present evidence showing that NEP sold those facilities for a large profit --approximately $590,000,000 over and above its cost of the facilities sold. This profit over and above cost, as well as the cost of those facilities, has to be deducted from the previous Tariff No. 1 costs of service. NEP has applied those reduced costs to the CTC rates of its affiliates so that those CTC rates are less than half of the amount that NEP now seeks to bill Norwood under the CTC option it filed after Norwood had changed suppliers. As this Court recognizes in its decision, Tariff No. 1 cannot be based on costs that NEP no longer has, especially where NEP has made a substantial profit over those former costs in selling those facilities. See Decision at 3.

Furthermore, NEP, as part of its divestiture, has obtained the right to engage in the purchase and sale of electric power at unregulated market based rates. Its costs thereunder are relevant as to Norwood's damages for breach of contract.

7. The determination of damages requires resolution of factual issues by the jury.

In damage actions, as in all civil actions tried before a jury, the amount of such damages is for the jury to determine. 22 Am. Jur. 2d, Damages, § 980. This also includes mitigation issues. See id. § 981. The trial court may not grant summary judgment in a action for breach of contract against a defendant where there is a genuine issue of material fact concerning the sufficiency of plaintiff's attempt to mitigate damages. Id.; see also § 983.

CONCLUSION

For the above reasons, NMLD requests that the court set the issue of damages for trial before a jury after a reasonable period for discovery has been completed.

Respectfully submitted,

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March 1, 2001

SUPPLEMENTAL APPENDIX B

COMMONWEALTH OF MASSACHUSETTS

SUPERIOR COURT

CIVIL ACTION NO. 98-2650A

NEW ENGLAND POWER COMPANY

V.

TOWN OF NORWOOD, MASSACHUSETTS
AND NORWOOD MUNICIPAL LIGHT DEPARTMENT

REPLY BY TOWN OF NORWOOD AND NORWOOD MUNICIPAL LIGHT DEPARTMENT TO NEW ENGLAND POWER COMPANY'S OPPOSITION TO EMERGENCY MOTION BY DEFENDANTS FOR A TRIAL ON THE ISSUE OF DAMAGES
(EXCERPT – PAGES 9-10)

III. NEP'S CALCULATION OF THE AMOUNT OF THE CTC FILED AT FERC IS INCORRECT

NEP's insistence that it can apply an 18% interest rate to FERC's CTC is simply wrong and NEP can point to no order of the FERC supporting its position. The express language of NEP's CTC provides that: ". . . the customer's payment shall include carrying charges at the unpaid amount of the Contract Demand charge at the interest rate determined pursuant to § 35.19a of the Commission's regulation (18 C.F.R. § 35.19a)." Since there is a dispute of

fact as to the applicable rate between NEP's affidavits and those submitted by the Town of Norwood, this requires a trial.[6]

Under the *PanAmerican* case, *supra*, NEP has no right to enforce any federal legal remedies in the state court. Accordingly, under the sections of FERC's Tariff Number 1, Schedule I, NEP has no remedy for 18% damages, if that section somehow applies even when no power has been delivered by NEP.

It is clear that NEP, having elected to pursue a breach of contract issue against Norwood in the Superior Court, is bound to be governed by the principles of Massachusetts law relating to the determination of damages for breach of contract.

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[6] The tariff schedules submitted by NEP in support of its contention, namely Tariff Number 1, Schedule 1, do not include the complete tariff, which makes it clear that the interest rates cited by NEP thereunder only apply to bills for actual power service that NEP has supplied to a customer. The full text of Tariff Number 1, Schedule I, is enclosed as an addendum to this reply, which consists of the "General Terms and Conditions" of NEP's Tariff Number 1.

SUPPLEMENTAL APPENDIX C

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

CASE NO. 2001-P-1467

NEW ENGLAND POWER COMPANY

v.

TOWN OF NORWOOD AND NORWOOD MUNICIPAL LIGHT DEPARTMENT

ON APPEAL FROM A JUDGEMENT OF THE WORCESTER COUNTY SUPERIOR COURT

BRIEF FOR THE DEFENDANTS-APPELLANTS TOWN OF NORWOOD AND NORWOOD MUNICIPAL LIGHT DEPARTMENT
(EXCERPT – PAGES 35-38)

III. THE COURT BELOW COMMITTED LEGAL ERROR BY REFUSING TO PERMIT A TRIAL ON DAMAGES.

As established in Argument I, the CTC does not apply here. At most, NEP is entitled to contract damages under Massachusetts law. Even if NEP could demonstrate a Norwood breach, the Court is confused about damages:

> Under this theory, then, Norwood would be liable to NEP for damages in contract for the unexpired portion of the Contract, less any

> mitigation of damages, such as avoided costs of production, much like the contract termination charge (App. 1045).

That is precisely the point. Contract damages are fundamentally different from the CTC. Norwood is still awaiting an opportunity to show that the CTC formula is, in fact, far more draconian than contract damages.[8] The CTC formula is based on the lost revenues under the Contract and premised on the supplier owning generation (which NEP does not) and having operation and maintenance expenses and fuel charge expenses.

By contrast, damages would be based on lost profits, a much smaller amount than any non-applicable lost revenues. In fact, NEP sold the very plants and power contracts that were used to provide power to Norwood for over $1 billion dollars. See New England Power Co., 82 FERC ¶61,179, at 61,656 (1998). However, the CTC charge never took such mitigation into effect as is required under Massachusetts law. F.E. Atteaux & Co. v. Mechling Bros. Manufacturing Co., 245 Mass. 483, 499 (1923); Hall v. Paine, 224 Mass. 62, 65 (1906).

A. NEP has the Burden to Prove Damages.

It is axiomatic that the plaintiff must prove each element of its case in order to prevail; in an action for breach of contract, the plaintiff must show that it was

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[8] Even NEP appears to have envisioned a damages trial. See ¶2 of its Prayers for Relief (App. 12). See also ¶13 of its Complaint (App. 10) in which even NEP describes the CTC as designed to "...compensate NEP for the damages resulting from Norwood's premature termination of its contract." (emphasis supplied).

damaged by the breach. See Singarella v. City of Boston, 342 Mass. 385, 387 (1961). Provided the plaintiff can prove that it was damaged, it must also prove the extent of damages. Eastern Advertising Co. v. Shapiro, 263 Mass. 228, 232 (1928); D. O. Haynes & Co. v. Nye, 185 Mass. 507, 509 (1904). If the plaintiff is unable to prove any damages resulting from the breach of contract, it is entitled to only nominal damages. St. Charles v. Kender, 38 Mass.App.Ct. 155, 161 (1995); Rombola v. Cosindas, 351 Mass. 382, 384 (1966).

Here, NEP never delivered any power to Norwood for which NEP did not receive payment. NEP has never had to prove that one penny of the $27 million constitutes some form of "reliance damages". The failure to prove any damages is tantamount to the failure to make a case of breach of contract.

B. NEP Had A Duty To Mitigate Damages.

Under contract law, damages should be reduced by any amount which could have been reasonably mitigated by the party seeking relief. Any power NEP was no longer required to deliver to Norwood, placed a mitigation burden on NEP to seek to resell that power to other entities. If provided the opportunity, Norwood will establish that NEP has not suffered any damages because NEP has, in fact, in many cases, resold the power to another party at prices exceeding the price in Norwood's Contract. NEP was under an obligation to mitigate damages, and cannot recover damages flowing from consequences which that party could reasonably have avoided. See Hall v. Paine, 224 Mass. 62, 65 (1916); Degener v. Gray Lines, 331 Mass. 133 (1954); Anthony's Pier Four v. HBC Assoc., 411 Mass. 451, 455 (1991). It is for the jury to determine whether the plaintiff could have lessened the injury it claims by the exercise of

ordinary care and at reasonable expense. See Degener v. Gray Lines, 331 Mass. at 133-34; Belkus v. City of Brockton, 282 Mass. 285, 288 (1933).

C. The Applicable Interest Rate Is Not 18%.

If the CTC somehow applied, NEP's interest rate is wrong. NEP's claim, in its Supplemental Brief in Support of Motion to Require Town of Norwood to Post Bond dated February 23, 2001, that the Town of Norwood "owes [NEP] the amount of $27,149,054.08 as of January 31, 2001" is incorrect (App. 1047). NEP's contract termination charge filed at the FERC specifies the following:

> . . . the Customer's payments shall include carrying charges at the unpaid amount of the Contract Termination Charge at the interest rate determined pursuant to Section 35.19a of the Commission's regulations (18 C.F.R. §35.19a) effective on the Early Termination Date and compounded monthly . . .(App. 559).

The Commission's regulations at 18 C.F.R. §35.19a describe the interest rate as the prime rate.

In its constant effort to squeeze more from Norwood's ratepayers, NEP argued below - and the Court erroneously agreed - that Tariff Section J "Billings and Payment" controls. That section only applies where power is sold and not to the CTC.

SUPPLEMENTAL APPENDIX D

FEDERAL ENERGY REGULATORY COMMISSION

Docket Nos. EL03-37-000, EL03-37-001

TOWN OF NORWOOD, MASSACHUSETTS

v.

NATIONAL GRID USA
NEW ENGLAND ELECTRIC SYSTEM
MASSACHUSETTS ELECTRIC COMPANY AND NARRAGANSETT ELECTRIC LIGHT COMPANY

EXHIBIT S-10,
SURREBUTTAL TESTIMONY OF WENDELIN W. WHITFIELD
WITNESS FOR THE STAFF OF THE FEDERAL ENERGY REGULATORY COMMISSION
(FILED APRIL 5, 2004)

Q. PLEASE SUMMARIZE YOUR SURREBUTTAL TESTIMONY.

A. This testimony explains the need to correct Staff's CTC cap calculation based on new data provided with the Respondents' answering testimony. The new data indicates that all post-divestiture fixed costs were not included in Staff Exhibit S-2, page 23. Thus, the CTC cap applicable to Norwood previously calculated as $9.0 million should be $25.4 million (Exhibit S-12). Ms. Whitfield explains why she switches from pre-divestiture to post-divestiture data

also provided by the Respondents with the filing on March 9, 2004. Finally, Ms. Whitfield states that this testimony will ensure that the decision-makers have before them Staff's best estimate of the loss involved in this proceeding.

Q. ARE YOU THE SAME WENDELIN W. WHITFIELD WHO PREVIOUSLY FILED TESTIMONY IN THIS PROCEEDING?

A. Yes.

Q. WHAT IS THE PURPOSE OF YOUR SURREBUTTAL TESTIMONY?

A. My purpose is to explain corrections to Staff's CTC cap calculation based on new data provided by Respondents' witness Terry L. Schwennesen in Exhibits NEP-27 and NEP-35. My use of costs labeled "Fixed Component" from the pre-divestiture estimates provided in Docket No. ER97-678-000 omitted estimated fixed costs labeled "Variable Component." The cap reflected in Staff Exhibit No. S-2 , page 23 thus excludes some of NEPCO's fixed power supply costs. (See Exhibit NEP-27, at page 2, line 19.) The Company admits that there was no indication in the NEPCO settlement sheets previously used that fixed costs were partially allocated to the *variable* component. (See the response to Staff Data Request S/Nat.Grid-5.32 at Exhibit S-11.) Further, Ms. Schwennesen points out that NEPCO estimated its remaining fixed power supply costs after the divestiture transaction, and she provides this information in Exhibit NEP-35 under the Post-Divestiture Basis column. Therefore, my revised fixed costs estimate from Docket No. EC98-1-000 (the divestiture proceeding) more accurately reflects fixed costs than my original estimate. I am therefore submitting a revised calculation of the Norwood CTC cap

adopting a post-divestiture basis rather than a pre-divestiture basis.

Q. ARE YOU SPONSORING ANY EXHIBITS IN CONNECTION WITH THIS TESTIMONY?

A. Yes. In addition to Exhibits S-10 (this testimony) and S-11 (the data response), I am sponsoring Exhibits S-12, S-13, S-14 and S-15. Exhibit S-12 contains my revised cap calculation based on the post-divestiture data provided by National Grid's witness in Exhibit NEP-35, which is also included for convenience as Exhibit S-13. Exhibit S-14 contains a corrected version of Exhibit S-2, page 23, which updates fixed costs to include those reflected in the variable component. Exhibit S-15 contains a chart comparing Staff CTC calculations and summarizing the differences.

Q. PLEASE FURTHER DESCRIBE EXHIBIT S-12, AS THIS REPRESENTS STAFF'S REVISED POSITION ON THE APPROPRIATE CTC CAP.

A. This exhibit more accurately reflects fixed costs. It thus revises the CTC cap applicable to Norwood from $9.0 million to $25.4 million. This value was developed by applying Norwood's load percentage to the total calculated remaining fixed costs after NEPCO's divestiture of non-nuclear generating assets, and using present value analysis for the remaining contract obligation period ending October 31, 2008. As noted in the comparison chart, Exhibit 15, if I had estimated the non-nuclear fixed costs lower, the results of my adjusted pre-divestiture method (Exhibit S-2, page 23) would have closer matched my revised calculation. This provides me with a higher degree of confidence in the new calculation of the appropriate CTC cap for Norwood.

Q. WHY DO YOU BELIEVE IT IS IMPORTANT TO FILE THIS SURREBUTTAL TESTIMONY?

A. This testimony and the associated exhibits are needed to correct for erroneous exclusion of "variable" fixed costs in my cap estimate, which led me to underestimate the cap. Also, this testimony will ensure that the decision-makers have before them Staff's best estimate of the loss involved in this proceeding.

Q. DOES THIS CONCLUDE YOUR TESTIMONY?

A. Yes.

(3)

Supreme Court, U.S.
FILED
MAY 10 2004
OFFICE OF THE CLERK

No. 03-1370

IN THE

Supreme Court of the United States

TOWN OF NORWOOD AND THE
NORWOOD MUNICIPAL LIGHT DEPARTMENT,
Petitioners,

v.

NEW ENGLAND POWER COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the Commonwealth of Massachusetts Appeals Court

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REPLY BRIEF

As the petition demonstrates, in 1998 the Federal Energy Regulatory Commission ("FERC") approved an amendment to the tariff of respondent New England Power Company ("NEPCO") that allowed its customers the option to terminate their power supply contracts by giving NEPCO 30 days' written notice and paying a customer-specific contract termination charge ("CTC"). *New England Power Co.*, 83 FERC ¶ 61,174 (1998). At the same time, FERC refused to accept for filing the rate that NEPCO proposed as the CTC for its contract with the Town of Norwood, see Pet. 9-10, and FERC has itself confirmed that it never accepted for filing the Norwood-specific rate components that would comprise an actual CTC rate, *Town of Norwood, Mass.* v. *National Grid USA*, 104 FERC ¶ 61,030, at 61,074 (¶ 18) (2003), Pet. App. 51a-52a.

Norwood never gave notice that it would choose the CTC option, and instead (as NEPCO acknowledges, Opp. 2-3) asserted a contract right of nonperformance because of what it alleged was NEPCO's material breach of its contractual obligations. Nonetheless, NEPCO pursued in state court a theory that payment of the CTC was mandatory once Norwood ceased performance (*i.e.*, ceased purchasing its power from NEPCO), even though Norwood (standing on its contract rights) had never elected the CTC option in writing under the tariff. NEPCO alleged that the tariffed CTC option was a filed rate; that Norwood's failure to pay the CTC was *ipso facto* a breach of contract; and that its unilateral and inflated declaration of the CTC rate components must be paid under the filed rate doctrine. The state courts agreed, Pet. App. 4a-5a, 31a-32a, awarding damages on the basis of NEPCO's calculation of a CTC rate that was never accepted for filing or approved by FERC, and that is more than double the maximum rate that FERC staff now says should be charged. See Opp. App. 16sa. Because damages were

awarded on the basis of a rate that was never filed with the FERC, the judgments below are in square conflict with this Court's decision in *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571, 577 (1981) ("*Arkla*"). Pet. 10-17.

Respondent seeks to avert this Court's review by raising a number of irrelevant arguments. None has merit.

1. Chief among NEPCO's red-herring arguments is its mischaracterization of the tariffed CTC formula as a "formula rate." It is nothing of the kind. Formula rates are ongoing rates for services that are provided on a continuous basis. See, *e.g.*, *Blue Ridge Power Agency* v. *Appalachian Power Co.*, 58 FERC ¶ 61,193, at 61,600 (1992) (setting monthly capacity equalization charges); *San Diego Gas & Elec. Co.* v. *Alamito Co.*, 46 FERC ¶ 61,363, at 62,108 (1989) (setting rates for energy sales). Formula rates incorporate routine variables (such as fuel prices) that fluctuate by their very nature, generally according to market pressures. See, *e.g.*, *Ocean State Power II*, 69 FERC ¶ 61,146, at 61,545 (1994) (the appropriate return on equity component in a cost-based formula rate is "dependent upon shifting combinations of that company's risks and contemporaneous capital market conditions"). These fluctuations also must be relatively predictable and well-understood. *Id.* at 61,552 ("[O]ur acceptance of formula rates is predicated upon their fixed, predictable nature. That necessarily requires that the various components of the formula be predictable . . . .").

The CTC formula has none of the characteristics of a formula rate. First and foremost, it is not a rate at all. As the First Circuit has stated, FERC merely permitted a "generic" amendment of the tariff, *Town of Norwood, Mass.* v. *FERC*, 202 F.3d 392, 400 (1st Cir. 2000), to specify the formula for setting a CTC rate for any given customer. A CTC rate is always customer- and contract-specific; it does not exist outside a given contract; and it is wholly indeterminate until the customer gives notice of the date of termination. The CTC option gives the customer a right to choose to pay a rate

comprised of those components if it wishes to cease performance, rather than simply breaching and having to litigate and pay damages in an action for breach of contract. But the tariffed CTC formula sets forth only a *rate structure*, which as the FERC has ruled, is parallel to the "avoided cost concept that is similar to the lost revenues approach that the Commission approved in Order No. 888," the major FERC order creating open access in interstate electricity transportation. Pet. App. 47a (footnote omitted). The tariffed CTC formula is no more a "rate" than the generic stranded-cost formula announced in Order No. 888.[1] There is only a determinable rate when the customer gives notice of the date of termination, at which point the CTC rate for that contract (based on expected revenue, the market value of released energy and capacity, and the remaining contract term) can be calculated. Thus, the proper procedure is for NEPCO to file a CTC rate schedule for the specific customer upon the date of noticed termination under section 205(c), 16 U.S.C. § 824d(c), whereupon the FERC itself could review the rate. In addition, interested parties (including the wholesale customer, competitors, and consumers) could challenge it, under section 205(e) as unjust, unreasonable, or nondiscriminatory, *id.* § 824d(e). There is no "filed" CTC rate prior to that time.

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[1] Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, 61 Fed. Reg. 21,540, 21,636 n.631 (May 10, 1996), ("[W]e have provided procedures in this Rule, including a formula that the utility is to use to calculate a departing generation customer's stranded cost obligation, that allow a customer considering switching power suppliers to request a stranded cost determination from the utility at any time before the expiration of the customer's wholesale requirements contract."), *order on reh'g*, Order No. 888-A, 62 Fed. Reg. 12,274 (Mar. 7, 1997), *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group* v. *FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York* v. *FERC*, 531 U.S. 1 (2002).

Second, the CTC formula differs from a formula rate because it is not a charge for the future provision of service, where certain rate inputs contingent on future events are "fixed" and "predictable" although not precisely known. *Ocean State Power II*, 69 FERC ¶ 61,146, at 61,552. This CTC is a one-time charge (payable over a multiyear termination period) incurred solely by the customer's election of a contractual right to terminate service, and its component values are fully determined at the time the CTC rate should be properly filed with the FERC under section 205(c) (*i.e.*, the date of notice of termination). There are no future contingencies in a proper CTC rate, as there are in a formula rate. Thus, NEPCO simply confuses the issue and compares apples and oranges by analogizing the generic CTC formula (a rate structure) to a formula rate (which is an actual *rate* that has contingent factors). Simply because the CTC (like most rate structures) is a formula does not make it a formula rate.

Indeed, a Federal Energy Regulatory Commission ("FERC") official has testified that the CTC is not a formula rate: "While NEPCO characterized the filing as a formula rate, it does not provide for tracking of changes or component values [as would a formula rate]." Ex. S-1, Whitfield Dir. Test. at 7, *Town of Norwood, Mass.* v. *National Grid USA*, Nos. EL03-37-000, -001 (taken Feb. 10, 2004), Reply App. 3a. In the deposition that followed, this FERC official confirmed her view that, except in a formal sense, the CTC is "not a formula rate. . . . in that it was not anticipated to be trued up or to be . . . applied to the same customer more than once." Whitfield Dep. Test. at 64, *Town of Norwood, Mass.* v. *National Grid USA*, Nos. EL03-37-000, -001 (taken Mar. 4, 2004), Reply App. 5a.[2] Because the CTC rate components

[2] NEPCO is therefore correct that "none of the cases Norwood cites involved formula rates." Opp. 8. Outside the exceptions for formula rates, *Hampshire Gas Co.*, 6 FERC ¶ 61,249, at 61,607-08 (1979), a rate is considered "filed" only when its numerical components are specified. *Electrical Dist. No. 1* v. *FERC*, 774 F.2d 490, 491-93 (D.C. Cir. 1985) (Scalia, J.), *abrogated by Transwestern Pipeline Co.* v. FERC, 897 F.2d

unilaterally declared by NEPCO in the courts below were never previously filed with or approved by FERC, the award of damages based on NEPCO's unfiled CTC calculations runs afoul of the filed rate doctrine, which this Court has long held to be a cornerstone of utility law. *Montana-Dakota Utils. Co.* v. *Northwestern Pub. Serv. Co.*, 341 U.S. 246, 250-52 (1951). The filed rate doctrine requires that a rate is enforceable only when the relevant agency (here, FERC) properly approves and accepts it for filing. *Arkla*, 453 U.S. at 577; *Montana-Dakota*, 341 U.S. at 250-52. Because the CTC is not a formula rate, the filed rate doctrine demands that the CTC in its entirety—including both its formula *and* its components—be approved and accepted for filing in order to become effective. See Federal Power Act ("FPA") § 205(c), 16 U.S.C. § 824d(c) (requiring public utilities to file with FERC "schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges").

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570 (D.C. Cir. 1990) (abrogated with regard to formula rates and compliance filings). The FPA "requires the rate itself to be specified." *Id.* at 492. To hold otherwise, as Judge Scalia explained for the court, would destroy "the necessary predictability [that] is the whole purpose of the well established 'filed rate' doctrine." *Id.* at 493. Thus, FERC "cannot fix a rate, as it purports to [do] here, without ever seeing it." *Id.* at 495. There is a "filed rate" only when a numerical rate (in dollars) is specified.

Respondent erroneously cites *Entergy Louisiana, Inc.* v. *Louisiana Public Service Commission*, 539 U.S. 39 (2003), as support for his position. *Entergy* involved automatic adjustment clauses, 16 U.S.C. § 824d(f), which are not remotely similar to the CTC. To the contrary, *Entergy* supports Norwood's petition. The *Entergy* Court ruled that "federal pre-emption through the Supremacy Clause" bars the state public utility commission and state courts, 539 U.S. at 47 (citing *Arkla*, 353 U.S. at 581-82). *Entergy* thus supports the application of the federal filed rate doctrine to preempt a damages award on the basis of NEPCO's calculations of the CTC rate components, which were never "accepted" or "approved" by the FERC. The FERC is now determining the proper value of those components.

The critical point is that in 1998 FERC never accepted for filing the CTC rate (nor any of NEPCO's proposed, Norwood-specific rate components that yield the rate when plugged into the general formula). FERC concluded that it "has approved the use of a CTC for the early termination of a contract and has accepted NEPCO's CTC formula, but has not accepted the individual components of the CTC calculation." *Town of Norwood*, 104 FERC ¶ 61,030, at 61,074 (¶ 18).[3] The Commission subsequently set the components for hearing. *Id.* This conclusion comports with the fact that FERC never approved or accepted for filing NEPCO's proposed Exhibit E to the tariff amendment, which calculated the proposed rate components and set forth a specific monthly contract termination rate for Norwood of $615,674. Instead, FERC accepted only the generic formula contained in Exhibit A, which is comprised of a Revised Term of Service Provision and Schedule II-C. *New England Power Co.*, 83 FERC ¶ 61,174, at 61,724 (designating in its order only the Revised Term of Service Provision and Schedule II-C); Pet. 7-10. FERC had no cause to accept Exhibit E because it was premature, since Norwood had not elected the CTC option by written notice.

Because the filed rate doctrine prohibits the charging of rates that have not been filed with FERC, the Massachusetts Court of Appeals erred in upholding a damages award that was based on an unfiled CTC rate. The Appeals Court missed the point in concluding that the July 2003 FERC order offers only prospective relief and therefore does not apply to NEPCO's claim for damages. Pet. App. 5a & n.6; see also Opp. 10 (making the same mistaken argument). This relief is

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[3] As FERC staff have also testified, "while the Commission may have approved the general idea of a CTC for Norwood, it has not approved this particular CTC, nor has it accepted or approved any of the assumptions underlying the stranded cost calculation as the basis for any of the elements of the CTC formula." Whitfield Dep. Test. at 12, *Town of Norwood, Mass.* v. *National Grid USA*, Nos. EL03-37-000, -001 (taken Feb. 10, 2004), Pet. App. 70a.

beside the point; FERC's determination in the July 2003 order that it never approved for filing the CTC components (and the CTC as a whole) bears directly on this case because NEPCO cannot claim damages based on a rate that has never been filed with FERC. As demonstrated in the petition, the decision below is in direct contravention of this Court's decision in *Arkla*, which held that "[i]t would undermine the congressional scheme of uniform rate regulation to allow a state court to award as damages a rate never filed with [FERC] and thus never found to be reasonable within the meaning of the [Natural Gas] Act." 453 U.S. at 579; see Pet. 10-17. In other words, the filed rate doctrine demands that FERC have "an opportunity *in every case* to judge the reasonableness of the rate." 453 U.S. at 582 (emphasis added).

Contrary to NEPCO's arguments, *Arkla* unquestionably governs this case, and this Court should grant review to rectify the state court's egregious deviation from *Arkla*. In both this case and *Arkla*, state courts calculated damages using unfiled and unapproved rates (here, the CTC, and in *Arkla*, the rate that would have been submitted had the contract been followed). These state courts both rendered judgments using the unfiled rates based on their speculation about what FERC might have done had it reviewed the unsubmitted rates (*i.e.*, accepted them for filing, respectively). By invading FERC's province, the Massachusetts Appeals Court erred just as its sister court did in *Arkla*, and this Court should grant review to establish uniformity in the law and restore the proper jurisdictional balance between federal agencies and state courts over interstate power contracts.

2. NEPCO's remaining arguments are misplaced. NEPCO contends that Norwood slept on its rights by not filing a section 206 complaint before 2002. See Opp. 9. That is untrue. Section 206 is invoked *after* a rate has been accepted for filing under section 205, and it would have been improper to file a section 206 complaint initially because the

CTC was unfiled and ineffective, as FERC later confirmed, *Town of Norwood*, 104 FERC ¶ 61,030, at 61,074 (¶ 18). It was only on February 8, 2001, when the Superior Court rendered its (erroneous) decision treating NEPCO's unilateral declarations of the CTC values as a "filed rate," Pet. App. 31a-32a, that Norwood was left with no choice but to file a section 206 proceeding in 2002, while continuing to seek to overturn the superior court's judgment on appeal (including this petition).

NEPCO points to *Town of Norwood*, 202 F.3d at 401 (citing 83 FERC ¶ 61,174, at 61,724), where the First Circuit stated that Norwood "presumably" had a section 206 remedy to challenge the components the CTC rate. Opp. 2-3. However, those decisions cut against respondent. *If* Norwood had given notice that it was electing the CTC option, and *if* NEPCO had properly filed a Norwood-specific rate under section 205, then (as both the FERC and First Circuit rightly point out) the proper venue for challenging the rate components is a section 206 proceeding. Neither the FERC nor the First Circuit suggested a section 206 proceeding was proper before an actual CTC rate was filed. NEPCO's position that a utility's unilaterally declared rate is binding even if never filed with (and accepted by) the FERC *until* it is challenged in a section 206 proceeding cannot be squared with the filed rate doctrine.

3. Equally unavailing is NEPCO's complaint that both in superior court and the court of appeals Norwood "did not raise any computational issue other than [the] interest rate; instead, it argued that the trial court was required to hold a trial on issues outside the scope of the CTC." Opp. 4. This argument overlooks the settled law that the reasonableness of an FPA rate cannot be challenged in court, for that is the exclusive preserve of the FERC to determine. *Montana-Dakota Utils.*, 341 U.S. at 251. Norwood's consistent position was that it had no obligation to pay the CTC, and thus at most it could be liable for contract damages. See Pet.

App. 32a n.15; Opp. App. 10sa ("the CTC does not apply here. At most, NEP is entitled to contract damages under Massachusetts law"). If (contrary to fact) the CTC did apply as a "filed rate," Norwood could not challenge the elements of that rate in state court; it could only challenge the interest rate, which is what Norwood did in its alternative argument. *Id.* at 13sa ("If the CTC somehow applied, NEP's interest rate is wrong."). But of course the CTC was not a filed rate, as the FERC later held in a ruling that was briefed to the court of appeals. Pet. App. 58a-61a. In any event, it is the state court's holding, not the arguments of the parties that matters for this Court's review. *Raley* v. *Ohio*, 360 U.S. 423, 436 (1959) ("There can be no question as to the proper presentation of a federal claim when the highest state court passes on it.").

4. Finally, NEPCO objects to Norwood's citation of FERC staff testimony in an ongoing FERC proceeding. Opp. 9-10. Those objections are unsound. Norwood noted that the "agency proceedings" were "pending," and did not present the FERC staff testimony on the proper CTC calculation as the position of the Commission. Pet. 16. Rather, Norwood cited the testimony to illustrate the injustice that NEPCO is attempting to perpetrate here in violation of the filed rate doctrine. NEPCO is correct that, after the filing of the petition for certiorari, the FERC witness revised her calculation of the total CTC rate for the entire termination period to $25.4 million (up from $ 9 million). But even a $25.4 million rate is still a far cry from the $78 million in payments that NEPCO claims for the same time period based on the inflated rate calculations that it submitted to the state courts, and that those courts accepted as unchallengeable. NEPCO could never have received the judgment it did had it properly filed its claimed Norwood-specific CTC rate with the FERC for advance scrutiny under section 205 of the FPA.

In sum, FERC has not characterized the CTC as a formula rate, nor has it approved the CTC as effective or accepted it

for filing. Rather, FERC approved an amendment to NEPCO's Tariff No. 1 which allowed NEPCO to offer Norwood—if it sought to terminate the contract—the *option* of accepting the customer-specific CTC penalty rather than contract damages. See *New England Power Co.*, 83 FERC ¶ 61,174, at 61,723 (accepting "amendment provid[ing] NEPCO's Tariff No. 1 customers with the *option* of buying out their service agreements by the payment of a CTC" because it "would be supplemental to, and generally consistent with, the existing opportunity available to Tariff No. 1 customers to seek to modify and/or terminate their contracts.") (emphasis added); see also Pet. 13 n.2. The state courts were wrong to treat the NEPCO's unfiled rate demand as a "filed rate" that became part of Norwood's contract; wrong to hold that the failure to pay that demand was itself a breach of contract; and wrong to assess damages on the basis of unilateral component calculations that were never part of a filed rate. The state court overreached into FERC's exclusive jurisdiction by awarding $27 million in damages through January 31, 2001 ($78 million for the entire termination period) based on this unfiled rate. Furthermore, this substantial and disproportionate judgment will undoubtedly cripple the Town of Norwood, a municipality of 28,000 people which comprise only 1.32% of NEPCO's total load.

This case strikes to the heart of the filed rate doctrine. This Court should grant certiorari to vindicate that doctrine and to restore the balance of power between federal agencies and state courts under the Federal Power Act.

CONCLUSION

For the reasons stated above and in the petition, the petition for a writ of certiorari should be granted, and the judgment below summarily reversed, or the case set for argument.

Respectfully submitted,

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May 10, 2004

APPENDIX

APPENDIX A

FEDERAL ENERGY REGULATORY COMMISSION

Docket Nos. EL03-37-000, EL03-37-001

TOWN OF NORWOOD, MASSACHUSETTS

v.

NATIONAL GRID USA
NEW ENGLAND ELECTRIC SYSTEM
MASSACHUSETTS ELECTRIC COMPANY AND NARRAGANSETT ELECTRIC LIGHT COMPANY

EXHIBIT S-1,
WENDELIN W. WHITFIELD DEPOSITION TESTIMONY
(EXCERPTS—PAGES 4-7)

(Taken Feb. 10, 2004)

* * * *

[4]

I. PLEASE PROVIDE THE BACKGROUND FOR THIS PROCEEDING.

[5] A. This case is directly related to the NEPCO filing of a contract termination charge (CTC) as a rate amendment to its FERC Electric Tariff No. 1 (Tariff 1 or tari[illegible]) in Docket No. ER98-2233-000, on March 18, 1998, and the Court of Appeals disposed of Norwood's appeal of the Commission's acceptance of the CTC. The Court invited Norwood to file a complaint against the way NEPCO calculated the CTC. This case returns to the Commission in the form of a complaint after a long history of proceedings, culminating with a hearing in the Court of Appeals.

The history and past relationship of the parties bear on the justness and reasonableness of the compensation sought by NEPCO from Norwood for early contract termination. Dr. John Wilson and Malcolm McDonald, Norwood witnesses, discuss the history and relationship of the parties. I do not disagree with their testimony on the history.

In 1983, the Commission accepted a service agreement for Norwood under NEPCO's tariff for full requirements service. As a result of the settlement between the two parties, that filing put Norwood on a comparable price basis with NEPCO's affiliates – Mass Electric and Narragansett. The settlement came after a long complaint proceeding, Civil Action No. 74-4104-T, starting in 1974, by Norwood against NEPCO and Boston Edison Company (Boston Edison) involving anti-trust and price squeeze claims. (See Norwood's Exhibit No. NOR-2). Under the settlement, Norwood began receiving electric energy from NEPCO with transmission services from Boston Edison Company. The initial term was for fifteen years, or until October 31, 1998.

[6] Beginning in December 1996, NEPCO made several major filings with the Commission to restructure its business and to revise its rates to facilitate customer choice and market-based pricing. In accordance with the directives of it[s] public utility commissions, NEPCO proposed to temporarily sell wholesale electric energy at reduced, non-cost-based rates under reduced rates called the "standard offer of service." However, this offer was made by NEPCO only to those retailers required by the state commissions to offer retail standard rates, which did not include Norwood. Subsequently, over Norwood's objections, the Commission approved: (a) NEPCO's restructured rates, including a freeze on the wholesale rates for remaining customers, including Norwood, under the tariff; and (b) the divestiture of NEPCO's non-nuclear generation. Norwood continued to fight these orders, but the Court of Appeals for the First Circuit

subsequently upheld the Commission, and the U.S. Supreme Court declined to hear Norwood's appeal.

Just after the Commission's approval of the restructuring, divestiture and settlements with affiliates, Norwood notified NEPCO, on March 4, 1998, that it was terminating service with NEPCO and would begin taking service from Northeast Utilities Service Company on April 1, 1998. This came after Norwood had unsuccessfully requested that NEPCO sell power to Norwood at the same market-based rates as NEPCO sold to its settling affiliates. Fourteen days after Norwood's notice of termination, and apparently [i]n response, NEPCO filed the tariff amendment at issue permitting Norwood to terminate its contract with only thirty days' notice with payment of the Contract Termination Charge (CTC) under [7] review in this proceeding. Although the filing was made as a tariff amendment applicable to any tariff customer, it was intended only for Norwood [] as it was not used for other Tariff 1 customers that terminated later. (See Exhibit S-2, pages 15 and 16.) While NEPCO characterized the filing as a formula rate, it does not provide for tracking of changes or component values. It is also unlike earlier contract termination charge provisions NEPCO filed for affiliates and the Town of Littleton, New Hampshire. These CTC amendments provided for more fact based computations with true ups and a sharing of credits from the divestiture of assets. (For a complete list of these settlements, including docket numbers, see Staff Exhibit S-2, pages .) In my opinion, this seems like unreasonable and disparate treatment of Norwood. Norwood refused to pay any of the CTC charges, and filed the complaint in this docket, after the Court of Appeals noted that Norwood could bring a complaint against the Company regarding the way the CTC was calculated.

* * * *

APPENDIX B

FEDERAL ENERGY REGULATORY COMMISSION

Docket Nos. EL03-37-000, EL03-37-001

TOWN OF NORWOOD, MASSACHUSETTS

v.

NATIONAL GRID USA, ET AL.

WENDELIN W. WHITFIELD DEPOSITION TESTIMONY
(EXCERPTS—PAGES 62-66)

(Taken Mar. 4, 2004)

* * * *

[62]

Q Could you please describe for me the Tariff 1 contract termination charge formula in [63] general terms?

A The filing in docket number ER 98-2233 contained a formula modeled after the Commission's stranded cost obligation formula which is to calculate lost revenues using the lost revenues approach.

The formula is simply stated R, which stands for the revenue minus transmission revenues, minus M, which stands for the market – market estimated – the market estimates, the estimated value of the – of the sale of the power, R times M times L, which is the length of obligation.

And this is a simple formula, but in the calculation, the values of R minus M are put into a present value analysis and – over the length of the L – for the term – for the number of years that L would encompass.

Q It's correct, isn't it, that the contract termination charge formula consists of more than just the single line of algebra that you've described?

A Right. That's correct. [64]

Q In fact, it includes five or so pages of instructions on how to apply that formula?

A Yes, there are instructions on how to apply the formula.

Q Is the Tariff 1 contract termination charge formula a formula rate?

A No, it's not a formula rate. It is a – it takes on the form of a formula rate, but it's not a formula rate that – a formula rate in that it was not anticipated to be trued up or to be – to be applied to the same customer more than once.

Q Okay. That's good.

You are aware, are you not, that New England Power Company still has some customers who are taking wholesale requirement service under Tariff 1?

A Yes, I am.

Q If one of those customers – say, Green Mountain Power Company – were to decide tomorrow that it wants to terminate service before its contract expires, does the contract termination [65] charge formula contain the number that tells you what they would be charged for a contract termination charge?

A No, it doesn't.

Q So then you would agree that the contract termination charge formula is a formula rate in the sense that it describes how the charge will be calculated –

A Right.

Q – is that correct?

A (Witness nods head.)

Q And you believe that the Commission accepted NEP's contract termination charge formula in 1998 but did not approve that formula; is that correct?

A Yes.

Q What's the difference?

A The Commission made a cursory review and said that this formula that – that New England Power Company filed based on its own stranded cost obligation formula could be used. It did not evaluate the appropriateness of the – or the [66] application of the formula, which I think is essential.

There was no evaluation of the application of the formula to see that the results produced using that formula are reasonable.

* * * *